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ESSAYS

UPON

SEVERAL SUBJECTS

CONCERNING

BRITISH

ANTIQUITIES,

VIZ.

I. INTRODUCTION of the FEUDAL LAW INTO *SCOTLAND*.

II. CONSTITUTION OF PARLIAMENT.

III. HONOUR. DIGNITY.

IV. SUCCESSION OR DESCENT.

With an APPENDIX upon *Hereditary* and *Indefeasible* RIGHT.

Composed *anno* M.DCC.XLV.

By Mr. Home. Advocate.

EDINBURGH,

Printed for A. KINCAID, M.DCC.XLVII.

The 1st Edition

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BRITISH MUSEUM

VIZ.

I. Introduction to the Feudal Law.

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III. Honour, Dignity.

IV. Succession or Descent.

With an APPENDIX upon Military and Feudal Right.

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INTRODUCTION.

TO our late Troubles the Publick is indebted for the following Papers, if they are of Value to create a Debt. After many diſconſolate Hours, the Author took Courage to apply himſelf to ſome Study, which might divert him from brooding over the Diſtreſſes of his Country. One Subject led to another, till a Sort of Work grew under his Hand. His only View at firſt was private Amuſement, nor at preſent does he eſteem the Thing of Value to be publiſhed for its own Sake. But he confeſſes, he has at Heart to raiſe a Spirit among his Countrymen, of ſearching into their Antiquities, thoſe eſpecially which regard the Law and the Conſtitution; being ſeriouſly convinced, that nothing will more contribute than this Study, to eradicate a Set of Opinions, which, by Intervals, have diſquieted this Iſland for a Century and an Half. If theſe Papers have the Effect deſigned, it will juſtify the Publication: They will ſerve at leaſt to bear Teſtimony of ſome Degree of

Firm-

Firmneſs in the Author, who, amidſt the Calamities of a Civil War, gave not over his Country for loſt; but truſting to a good Cauſe, and to good Diſpoſitions in the Bulk of his Countrymen, was able to compoſe his Mind to Study, having no other Opportunity of being uſeful; and to deal in Speculations, which are not reliſhed, but in Times of the greateſt Tranquillity.

Of

ESSAY I.

Of the Introduction of the FEUDAL LAW *into* SCOTLAND.

THE Introduction of the Feudal Law into *Scotland* is an Event, which makes not ſuch a Figure in our Hiſtory as it ought to do: It is mentioned indeed by moſt of our Hiſtorians, but dryly and curſorily, as if it were an ordinary Incident. And yet, as the Story is told, it appears to be a very ſingular Revolution, for which no adequate Cauſe is aſſigned. If Credit can be given to Hiſtory or Tradition, we were once a free People; nay, we are reported to have been fierce and untamed, our Nobles of great Power, generally too mighty for the Sovereign, priding themſelves upon Independency and Extent of Property. Now, as it is the Plan of the Feudal Law, to beſtow the whole Land Property upon the King, and to ſubject the Bulk of the People to him as his Servants and Vaſſals; a Conſtitution ſo con-

tradictory to all the Principles which govern Mankind can never be brought about, one ſhould imagine, without Violence, whether Conqueſt from without, or military Force from within: Yet neither of theſe Cauſes is aſſigned by our Authors, nor will the Hiſtory of *Scotland* admit of ſuch a Suppoſition; for no Period can be aſſigned, during which the Feudal Law might have been introduced, where there are any Traces of Conqueſt, or of military Power, ſufficient to inforce ſo unnatural a Conſtitution.

All our Hiſtorians are agreed, that this Revolution happened in the Reign of *Malcolm* II. and they are alſo pretty much agreed upon the Circumſtances which brought it about. This King had been engaged in fierce Wars with the *Danes*, which, after various Succeſs, ended in driving the Invaders out of this Part of the Iſland. Many of his Nobles had done him notable Service; and, to reward their Fidelity, ('tis ſaid) he divided all the Crown Lands amongſt them. And ſo

circumſtantiate

circumſtantiate is the Story, that 'tis averred he retained no Lands to himſelf, but the *Mute-hill* in the Town of *Scoon*. A very extenſive and unprecedented Piece of Liberality. But what follows is ſtill more difficult to be believed; That the Lords, to teſtify their Gratitude, gave and granted to their Sovereign, and to his Heirs for ever, the Ward and Relief of their Lands with the Marriage of their Heirs. This is a ſhort Way of expreſſing a thing, which bears this obvious Meaning, that all the Lands in *Scotland* were ſurrendered to the King as his Property; that all the great Men came under perſonal Obligations to be his Servants and Vaſſals, holding only the Poſſeſſion of the Lands which they had ſurrendered, for Suſtenance of themſelves and their People, ready upon all Occaſions to fight his Battles. There are few Examples of ſo warm Returns of Gratitude among Individuals; but, in a whole Nation, altogether incredible. I ſhould be ſtunned with ſuch Liberty of Fiction in a Romance. Therefore, laying aſide this Account of the Matter,

as utterly improbable, the Deſign of this Eſſay is to bring together ſome Circumſtances, whence probable Conjectures may be formed, at what Time, and after what Manner, the Feudal Law was introduced into *Scotland*. I ſhall ſet out with the Time of Introduction, as it may give Light to the other Branch of the Diſquiſition; and I muſt confeſs, that, notwithſtanding the concurring Teſtimonies of all our Hiſtorians, I entertain ſome Doubts whether the Feudal Law was introduced into *Scotland* ſo early as in the Reign of *Malcolm* II. What to me brought this thing firſt under Suſpicion, is a Fact that can be made extremely evident. When one dives into the Antiquities of *Scotland* and *England*, it will appear that we borrowed all our Laws and Cuſtoms from the *Engliſh*. No ſooner is a Statute enacted in *England*, but, upon the firſt Opportunity, it is introduced into *Scotland*; ſo that our oldeſt Statutes are mere Copies of theirs. Let the *Magna Charta* be put into the Hands of any *Scotſman*, without giving its Hiſtory, and he will have no Doubt that

that he is reading a Collection of *Scots* Statutes or Regulations. Now it is a Point ſettled among the beſt *Engliſh* Antiquaries, That the Feudal Law was introduced into *England* by *William* the Conqueror. I need not ſpend Time upon this Topick, after what is ſaid by the accurate *Spelman*, and by our Countryman *Craig*. Joining theſe two things together, a ſtrong Preſumption ariſes, that the Feudal Law made its Progreſs from *England* to this Country, as all the *Engliſh* Statutes, making Improvements and Alterations upon it, certainly did. But this Preſumption receives additional Force, when it is conſidered, that if we had the Feudal Law before it came into *England*, it muſt have been taken from ſome other People than the *Normans*, with whom we had no Commerce. Upon that Suppoſition, we muſt expect to find the Feudal Cuſtoms in *Scotland*, after the Days of *William* the Conqueror, ſomewhat different from what they were in *England*, as the Feudal Cuſtoms were very different in different Nations. What we had in *Scotland* muſt have been

been formed upon the Plan of thoſe of the Country from which we borrowed them, perhaps a little varied in our Practice. Yet, upon Inquiry, we find no ſuch Diſparity as we ought to expect from the Suppoſition. On the contrary, I think it may with Aſſurance be pronounced, that the Feudal Cuſtoms in *England* and *Scotland* were preciſely the ſame, for a Century or two after the Days of *William* the Conqueror. This Congruity betwixt the Laws of the different Countries affords Evidence, as high as Probability can go, of one of two things, either that we borrowed the Feudal Law from *England*, or, that they borrowed it from us. The latter is not maintained by any Author; nor is there any Foundation for the Aſſertion, it being as well vouched as any Point can be, of that Antiquity, that *William* the Conqueror brought the Feudal Cuſtoms along with him from *Normandy*: And it is certain, he had no Intercourſe with *Scotland*, unleſs in the Shape of Enmity and War.

In fair Reaſoning it muſt be yielded, that the Circumſtance now mentioned ought to create a Suſpicion, that the Feudal Law is not of ſuch Antiquity in *Scotland* as is generally believed. But it will be ſaid, that Doubts and Suſpicions, however great, muſt yield to poſitive Evidence; and that we have not only the Authority of all our Hiſtorians for the Fact above mentioned, but ſtill a more convincing Evidence, the Laws of *Malcolm* II. ſtill extant, which bear, "That King *Mal-*
"*colm* diſtributed all his Lands in *Scotland*
"among his Men; reſerving nothing in Pro-
"perty to himſelf, but the Royal Dignity,
"and the *Mute-hill* in the Town of *Scoon*.
"And all his Barons gave and granted to him,
"the Ward and Relief of the Heir of ilk
"Baron, for the King's Suſtentation."

These Authorities appear to be of Weight, and ſhall be handled deliberately. Suppoſing the above mentioned Laws to be thoſe of *Malcolm* II. the Diſpute is at an End, and the Evidence complete, not only upon account of the

the above cited Paſſage, but becauſe in theſe Laws frequent mention is made of Feudal Cuſtoms, ſuch as the Office of Chancery, Charters, Saſines, Barons holding of the King, Knights holding of Barons, and others holding of Knights, *&c.* But when I weigh this Evidence of the Antiquity of the Feudal Law in *Scotland*, I perceive one Circumſtance wanting to make it complete. That theſe are the Laws of King *Malcolm* cannot be denied; they have in all Ages been reckoned authentic, and King *Malcolm* is mentioned in the Body of the Work: But it may be controverted, whether theſe are the Laws of *Malcolm* the II. We had four Kings of the Name of *Malcolm*; and we have no Authority, but from the Title, to aſcribe theſe Laws to the ſecond of that Name: But at what Time, or upon what Evidence was this Title added, we are altogether uncertain. The Title in the printed Copy is obviouſly a *poſt facto* Work; for it runs thus: "The Laws "of King *Malcolm Mackenneth*, ſecond of "that Name, who was Son to *Kenneth* the

"Third,

"Third, and began to reign in the Year of "the Creation of the World 4974, and of "Chriſt 1094. Theſe Laws are authentic, "&c." This Title proves only, that *Skeen* the Publiſher believed theſe to be *Malcolm* the II.'s Laws: Upon what Evidence he does not ſay, nor can it well be gathered, if it be not what ariſes from the Title given to the Manuſcript Copies, which in all Probability had no better Foundation than a vague Tradition.

But I chuſe not to reſt upon negative Arguments. There is Evidence the moſt convincing, that *Malcolm* the II. was not the Author of theſe Laws: This Evidence is drawn from the Work itſelf, wherein frequent mention is made of Earls and Barons, of the Chancellor and his Court, Coroner, *&c.* none of which Names, in all Probability, had a Being in the Time of *Malcolm* II. The Court of Chancery was not known in *England* before *William* the Conqueror; and it is not probable we had it before his Time. But

more positively, 'tis a Fact agreed upon by all Writers, that it was *Malcolm* III. who created the first Barons and Earls. *Dempster* the best of our Antiquarians, *p.* 120, *Malcolmus tertius, sublato Maccabæo tyranno, regnum legittime sibi debitum occupavit, quod ut ornaret unica cura incubuit: tunc et a prædiis nobilibus nomina quisque sumpsit, et cum magna frequensque nobilitas S. Margaretam ex Hungaria et Anglia secuta in Scotia consedisset, splendorem novo suo principatui additurus, Barones et Comites creavit.* Before the Days of *Malcom* III. *Thane* was the only Name in *Scotland* by which the Nobles were distinguished. Turn over the Historians, and there will not be found anywhere Mention of the Title of Baron before his Time, nor of Earl. All were called *Thanes*, such as the Thane of *Fife* in *MacBeath*'s Time, Thane of *Ross*, Thane of *Sutherland*, Thane of *Caithness*, &c. but from *Malcolm Canmore*'s Time downwards, not a Word of Thane; all the great Lords are either Earls or Barons. Here then the Evidence is compleat, that

these

theſe Laws are not of a more ancient Standing than the Reign of *Malcolm Canmore*, and to him therefore they muſt be reſtored: For they are the Laws of one King *Malcolm*, and 'tis more probable they are his, than the Laws of his great Grandſon *Malcolm* IV. before whoſe Time the Feudal Law was certainly introduced into *Scotland*.

HAVING diſcuſſed this Point, the Argument drawn from the Authority of the Hiſtorians will be eaſily got over. We have no Author who wrote in the Days of *Malcolm Canmore*, nor for many Ages after: Therefore, as our Hiſtories reſt upon no better Authority than Tradition, 'tis not ſurpriſing, that an Event which happened in the Reign of one King, ſhould be aſcribed to a Predeceſſor of the ſame Name, there being a prevailing Bias in moſt Nations to carry back their Antiquities as far as poſſible. But the Matter does not reſt here, the Error of theſe Hiſtorians may be detected from their own Writings. *Hector Boece*, for Example, who aſcribes

aſcribes the Introduction of the Feudal Law, as aforeſaid, to *Malcolm* II. adds with the ſame Breath, that it was *Malcolm* II. who divided *Scotland* into Baronies. We have therefore this Author's Teſtimony, that the ſame *Malcolm* introduced the Feudal Law, who divided *Scotland* into Baronies. This was certainly *Malcolm* III. And *Buchanan*, who for the moſt Part implicitely follows *Hector Boece*, yet, in telling the Story upon his Authority, expreſſes a Doubt, and inclines to think, that we had the Laws of Ward and Relief rather from the *Engliſh* and *Normans*.

THAT I may leave nothing untouch'd, which concerns a Point of ſuch Importance in the Antiquities of this Country, I proceed to ſome other Conſiderations, which I perceive may be made Uſe of to ſupport the high Antiquity of the Feudal Law in *Scotland*. One is made Uſe of by the learned *Craig* to that very End, *Multa tamen ſunt quæ me movent, ut hoc jure (ſciz. feudali) noſtrates uſos putem, antequam Angli eo uti cæperint. Hoc enim*

enim certiſſimum eſt, nos purius hoc jus habere quam vicinos; ut in rivulis aquarum qui quo propiores ſint fonti ſive ſcaturigini eo ſunt puriores. This Author probably had in View the Feudal Cuſtoms, as they ſubſiſted in his own Time; and 'tis very true, that in *England* the Feudal Law began ſooner to decline than it did in *Scotland.* Arts and Induſtry flouriſhed in that Kingdom long before they had any Life here; and I have obſerved elſewhere, that the ſtrict Regulations of the Feudal Law, are in a great Meaſure inconſiſtent with the Arts of Peace. But if *Craig* had under Conſideration the Feudal Law, as practiſed in this Iſland for ſome Ages after the Time of *William* the Conqueror, he is undoubtedly in a Miſtake. The Feudal Law, during that Period, was preciſely the ſame in both Kingdoms, ſo far as we can gather, by comparing the ancient Statutes and Law-books of *England* and *Scotland.*

THE *Regiam Majeſtatem,* the oldeſt Inſtitute we have of our Laws, is generally believed

lieved to have been compiled in the Reign, and by the Authority of *David* the I. And as it contains a full and accurate Syſtem of our Feudal Cuſtoms, a probable Argument may be ſuggeſted from it, that the Feudal Law had a Beginning in *Scotland* before the Days of *Malcolm Canmore*. For, if the Feudal Law was introduced by that King, there is no Probability it ſhould make ſo ſudden a Progreſs, as to be ripe for a regular Inſtitute in the Days of his Son *David*. This is not agreeable to the natural Courſe of things, and therefore not readily to be credited. Law is but of ſlow Growth, eſpecially among a rude People, more addicted to the Arts of War than of Peace. And yet, whatever be the Æra of the *Regiam Majeſtatem*, it appears from it, that the Feudal Law was brought to a conſiderable Degree of Perfection in *Scotland* at that Time. The Argument is weighty; and we muſt either give the Feudal Law a more early Date in *Scotland* than the Reign of *Malcolm Canmore*, or the *Regiam Majeſtatem* a later Date than the Reign of *David* I.

Touching

Touching this Matter one thing is certain, that the *Regiam Majeſtatem* was compiled in the Reign of one of our *Davids*. The Author, whoever he be, declares in his Preface, "That he was commanded by King *David* "to compile this Work, with the Counſel "and Advice of the whole Realm, that all "the Inhabitants thereof might learn and "have Knowledge of the ſame." What remains is to determine which of the *Davids* this was. If the Reader will indulge a ſhort Digreſſion, I ſhall make it evident, that it was *David* the II. who reigned two Centuries later than the other, the Diſtance of whoſe Reign from that of *Malcolm Canmore* affords ſufficient Time for the Ripening of the Feudal Law. All the World knows, that the *Roman* Law, after being buried in Oblivion for Ages, came to be reſtored in *Italy* by an Accident. The very Books of that Law were underſtood to be loſt paſt Recovery, till a Copy of the Pandects was found in the Town of *Amalphi anno* 1127. by *Lotharius* the Emperor, when he took

that

that Town, in the War he carried on againſt *Rodger* King of *Sicily* and *Naples*. The Knowledge of it increaſed ſo faſt, that it was taught publickly by *Vaccarius* at *Oxford* about the Year 1150, during the Reign of King *Stephen*. This was as ſwift a Progreſs as any Science can be ſuppoſed to make; and therefore no Probability we had it in *Scotland* before that Time, nor conſequently in the Reign of *David* the I. who died in the Year 1153. Theſe Facts will give Light to the Subject in hand. The Author of the *Regiam Majeſtatem* appears to be well acquainted with the Civil Law, and frequently appeals to it as to known Law. See *lib.* 2. *c.* 16. § 2. The *Regiam Majeſtatem* therefore, compiled when the Knowledge of the Civil Law was ſpread through *Scotland*, could not have a Being in the Days of *David* I. and conſequently the Argument is concluſive, that it was compiled in the Days of *David* II.

THUS I have endeavoured to make out, that the above remarkable Revolution in our Land

Land Rights happened in the Reign of *Malcolm Canmore*. And if there is any thing in the above Obſervations, it muſt afford an additional Conviction, that were one left to conjecture, the ſaid Reign would be pitched upon before any other, for the Introduction of the Feudal Law. This Law was brought into *England* by a Conqueror, at leaſt one who treated his new Subjects as a conquered People. It was evident, that the poſſeſſing of Land by Tenure, threw great Weight into the Scale of Royalty; and therefore, it will not be ſurpriſing, that a neighbouring Prince who underſtood his own Intereſt, ſhould endeavour to copy after ſo good an Example. At the ſame time, there never was in the Reign of any *Scots* King, ſuch a Conflux of Strangers into *Scotland*, as in the Days of *Malcolm Canmore*; *Engliſh* eſpecially, ſome of the higheſt Rank. By them the Faſhion was begun of Sirnames, many of which remain at this Day with our moſt illuſtrious Families. 'Twas to keep Pace with *England* that the new Titles of Earls and Barons were

introduced; and we may readily believe, that a politic King, who underſtood the Arts of Government, would not ſtop ſhort, but endeavour alſo to introduce the Feudal Law, which he could not but ſee would tend greatly to increaſe his Power and Authority; and the Conviction founded upon theſe Circumſtances turns ſtronger and ſtronger, when we conſider, that the Practice of giving Charters of Lands, is by our Antiquaries univerſally aſcribed to *Malcolm Canmore*. Many of our old Families pretend to have had Charters from that King, but none before his Time. Now, ſuppoſing the Feudal Law to have been as old in *Scotland* as *Malcolm* II. 'tis ſcarce ſuppoſable Charters would be of a later Date, as ſuch Writs ſeem to be neceſſarily connected with Feudal Grants.

And this leads to the ſecond Branch of the Enquiry, by what Means, and after what Manner were the Nobles prevailed upon, not only to part with their Lands, but to ſubject themſelves perſonally to Feudal Service.

How-

However the Matter might be at firſt diſguiſed, the total Surrender of Lands to the King during the Minority of an Heir, and the Year's Rent payable at the Entry of every Heir, were no ſlight Perquiſites to be yielded raſhly. The Matter is dark; and the Hiſtorians have touched it ſo ſlightly, that we have few Circumſtances to build Conjectures upon; and what makes the Story ſtill more myſterious, is, that we have Vouchers of extravagant Donations of the Crown Lands by *David* I. in favours of the Church. I cannot eaſily reconcile this with the Story told, that the King gave away the whole Crown Lands, reſerving nothing to himſelf but the *Mutehill* of *Scoon*. 'Tis true, there might have been Forfeitures in the Interim; and if any one is ſatisfied with this Solution, I have nothing to object, only the Interval betwixt the Reigns of *Malcolm Canmore* and of his Son *David* I. is, I'm afraid, too ſhort to make this Solution be generally reliſhed. At the ſame Time, King *David*'s Liberality to the Church is condemned by every Writer as truly unjuſt, with regard

gard to his Succeſſors, who were thereby deprived of their Birth-right, *viz.* the Patrimony of the Crown: And yet the Charge is ſcarce well founded, if in Fact nothing was given away, but forfeited Lands, which every King is privileged to diſpoſe of at his Pleaſure.

I CANNOT readily bring myſelf to believe, that *Malcolm Canmore* gave away the whole Crown Lands, as is related. And on the other hand, I can as little bring myſelf to believe, that by any Means leſs than abſolute Force, could the Bulk of the Nation be brought to ſubmit to an Act ſo viſibly prejudicial to them, that of ſurrendering their whole Lands to the King, and their Perſons alſo, reſerving only the Uſufruct, in Name of Wages, for Services to be performed by them.

IN a Matter ſo dark and intricate, I dare venture no further, than to ſuggeſt a few Conjectures. Before the Feudal Law was known in *Scotland*, I take it for granted, that our People held their Lands without Writ, and that

that Poſſeſſion was the Circumſtance which determined the Property of Lands, as at this Day it does of Moveables. Some Traces of this we have remaining in the *Orkney* Iſlands, where the Feudal Law is ſcarce yet fully eſtabliſhed. If inſtead of introducing the Feudal Law, all at once over the whole Kingdom, it ſhall be ſuppoſed, that *Malcolm Canmore* did no more but lay the Foundation of a Building, which was finiſhed by his Succeſſors, the Thing will be eaſily credited: And touching the Engines made Uſe of, we need not be at a Loſs, for we are directed to them by our Authors. It was certainly the Crown Lands which were made Uſe of as the Bait to allure the Nobles. A prudent Diſtribution of Part of theſe Crown Lands, without ſuppoſing the whole to be aliened, would go a great Way. No Perſon upon whom Crown Lands were beſtowed, could refuſe to hold them upon any Conditions the King was pleaſed to impoſe. Here was a Beginning given to the Feudal Tenure. If the Gift was conſiderable, the Receiver could not handſomely

avoid

avoid allowing his own Eſtate to be engroſſed in the Charter, if ſuch a Thing was demanded of him. And ſuch Stratagems would not be overlooked by an artful Monarch, who had it at Heart to make the Feudal Law univerſal in his Kingdom.

He had another Engine at hand. It is uncontroverted, that it was *Malcolm Canmore* who introduced the Titles of Earl and Baron. Poſſibly he had a further Deſign in this, than merely to emulate the Splendour of a neighbouring Court. Our Forefathers were fond of Titles, and were delighted with Shew and Equipage. If ſome were tempted by a new Title to give up their Independency, and to accept of their own Eſtates as a Gift from the King, holding of him by military Tenure, we will ceaſe to wonder at the unequal Purchaſe, when we ſee ſo many at preſent renouncing their Independency, and giving themſelves up as Slaves to a Court for Ribbands and Garters, ſtill more empty Geugaws, if poſſible, than Titles of Honour.

THE Foundation being thus happily laid, the Kings of *Scotland* had many Opportunities to carry on the Work. Our Forefathers were a fierce and reſtleſs People; Property was in a continual Flux by Forfeitures; and 'tis probable, that the Bulk of the *Terra firma* of *Scotland* has, by that Means, paſſed through the Sovereign's Hands one time or other. This afforded ample Means of extending the Feudal Law further and further, as Care was always taken to make out Gifts of Forfeiture in the Feudal Form.

ONE other Cauſe there was of the Growth of the Feudal Law, which, tho' working ſilently and imperceptibly, had I'm perſuaded a greater Effect than all the other Cauſes combined together.

MANKIND, eſpecially in ignorant Ages, are governed by Cuſtom and Habit. By the Growth of the Feudal Law, a Charter certainly came to be conſidered as the moſt ſolemn Title to Land, ſo as to give Poſſeſſion alone,

alone, without a Charter, a very ſlender Hold of the Imagination. Perhaps this had no remarkable Effect upon old Poſſeſſors. But ſingular Succeſſors, whether Creditors or Purchaſers, were in a different Situation. People who part with their Money will not be readily ſatisfied with any Title that is not of the beſt Sort. Thus, after the Commerce of Land was introduced, we may truſt that Charters were multiplied exceedingly. For whatever Security a Family might have from a long continued Poſſeſſion, the Notion would in time be firmly eſtabliſhed, that there was no ſecure Manner of transferring Land Property but by Charter and Saſine.

In ſhort, my Conjecture is, that the Feudal Law was not introduced all at once, as our Authors inſinuate, but by Degrees. And what I have often heard, favours this Conjecture, that ſo late as the Reign of *James* VI. there were Proprietors in *Scotland* who never had accepted of a Charter.

If I am not deceived, this was a Meaſure the moſt politic, and of the greateſt Foreca ſt, that ever was contrived. It was a bold Game for the King to play away his Crown Lands for a ſmall Conſideration in hand; but the Proſpect was fair, as no Conſtitution does more firmly unite a People with their Sovereign, than that of the Feudal Law, nor gives him ſuch an immediate Hold of the Perſons and Property of his Subjects. Our Hiſtorians give us to underſtand, that a prevailing Deſire to ſupport the Dignity of the Crown, gave Riſe to the Feudal Law in *Scotland*. I'm ſorry to obſerve, that Inſtances of public Spirit, even among Individuals, are rare in our Hiſtory. But I have read of no Inſtance of an univerſal public Spirit through a whole Nation, ſufficient to bring about ſuch a Revolution; one excepted, among the *Lacedemonians*, in the Days of their King *Lycurgus (a)*.

(*a*) Nor is the Evidence of this Piece of Hiſtory altogether above Exception. *Xenophon*, who writes a Treatiſe upon the *Spartan* Government, has not a Word of it.

ESSAY II.

CONSTITUTION *of* PARLIAMENT.

BY the Feudal Conſtitutions, every Superior had a Juriſdiction within his own Territory: His Vaſſals were obliged to attend his Courts, and it was their Province to try all Cauſes, Civil and Criminal, in Form of a Jury or Inqueſt. This is the Form of our County Courts at this Day, held at ſtated Times by the High Sheriff, in Name of the King; the Crown Vaſſals being all of them bound to appear under a Penalty, each in the Court of the County within which his Lands are ſituated. The Parliament is the King's Court for the Kingdom in general, and conſequently his whole Vaſſals within the Kingdom were bound to give their Attendance there. The Barons and Freeholders attended in this Capacity. The Biſhops, Abbots and Priors attended in the ſame Capacity; and if any of them held their Lands of a Subject, they certainly were not bound to perform this Service.

THE

The Idea of a King, where the Feudal Law took Place, is not that of a chief Magiſtrate or Governor, but that of a Paramount Superior, having the whole Property of the Kingdom veſted in him, having his Vaſſals attached to him by Homage and Fealty, and ſupported by him out of the Produce of his Lands: which makes a very ſtrict Connection and Union betwixt them. The Idea of a Parliament, as I have ſaid, is that of a Court where all the King's Vaſſals are obliged to attend for adminiſtrating of Juſtice, and for making Regulations to bind the whole Society.

It was one Effect of the Feudal Law to withdraw Land from Commerce. Land being allotted for the Maintenance of Servants or Vaſſals, ready to obey their Maſters Commands in War and Peace, the Superior could not ſell, becauſe the whole Profits ariſing from the Subject belonged to the Vaſſal, and the Vaſſal could not ſell becauſe he was not Proprietor. This was an unnatural Conſtitution, which could not ſubſiſt long in peaceable Times

Times. The Severity of the Feudal Law gave Place by Degrees to milder and more natural Regulations. Land the moſt deſirable Acquiſition came to be *in commercio*, and the Crown Vaſſals originally few in Number, and poſſeſſing large Territories were greatly multiplied. Purchaſers were willing to hold of the King rather than of a Subject; and the King was willing to encourage this Commerce, as it leſſened the Power of the great Barons. In Time the obliging ſo many ſmall Vaſſals to an expenſive Attendance in Parliament, was conſidered as a Grievance. In *England* this Grievance was remedied, probably in the Days of *John* or *Henry* III. for the Record of that Tranſaction is loſt. The Remedy was introduced with us later, and we have the Record entire. By the Act 101, *Parl.* 1427, the Attendance of ſmall Barons and Freeholders is diſpenſed with, provided they ſend to Parliament, from every Shire, two or more of their Number to repreſent them.

We followed the *Engliſh* ſo cloſe in all their Regulations concerning Law and Policy, that I am perſuaded our Statute 1427. has been copied from ſome *Engliſh* Statute enacted by King *John*, or in the Beginning of the Reign of *Henry* III. which is now loſt with the other Statutes of that Period. One thing is certain, that we find Knights of the Shire elected by the ſmaller Crown Vaſſals, preciſely as in *Scotland*, early in the Reign of *Henry* III. But this is not all. We find by King *John*'s Charter of Privileges to his *Engliſh* Subjects, Sections 17. and 18. that it was the Practice in his Days to ſummon to Parliament the greater Barons by Name, leaving the leſſer Barons and Freeholders to be ſummoned by the Sheriffs edictally, or in general Terms. Here we have the leſſer Barons attending perſonally. From the Reign of *Henry* III. downwards, the ſmall Barons and Freeholders never did Duty in Parliament, otherways than by ſending ſome of their Number out of each Shire to repreſent them. This makes it extremely evident, that the Attendance

dance of the ſmall Barons and Freeholders muſt in *England* have been diſpenſed with, as in *Scotland*, upon Condition of their ſending Repreſentatives. Their withdrawing from Parliament might have been overlooked; but ſo pointed a Regulation, as that of acting by Delegates, could never have been introduced otherways than by a Statute. The thing deſerves to be attended to, becauſe it laid the Foundation of a Houſe of Commons, of which more fully afterwards.

WHETHER the Royal Burrows were originally conſtituent Members of the Parliament is a Point much debated. It is obſerved, "That the *Reddendo* of their Charters being "Watching and Warding only, they were "not bound to give Suit and Preſence in any "of the King's Courts; that they had a Court "peculiar to themſelves, which was the "Chamberlain Ayr; that *de facto* there is no "Inſtance of their ever appearing in a Coun-"ty Court, and conſequently no Reaſon to "believe they appeared originally in Parlia-"ment;

" ment; and that in *England* there is no E-
" vidence upon Record, of Burgeſſes being
" called to Parliament, before 49. *Henry* III.
" at which time Writs were directed to the
" Sheriffs of the ſeveral Counties, to return
" the Knights of the Shire and Burgeſſes;
" whence 'tis conjectured, that the calling of
" the Burgeſſes to Parliament was a Politic of
" *Simon de Montfort*, who had at that Time
" the Power of the Kingdom in his Hands,
" and who called the Parliament 49. *Henry*
" III. in order to purge himſelf from Suſpi-
" cions ſpread abroad of his intending to uſurp
" the Crown." One Fact muſt be owned, with regard to *Scotland*, that in a Preamble to *Robert Bruce*'s Laws ſtill extant, the whole Orders are faithfully enumerated; Biſhops, Abbots, Priors, Earls, Barons, and other Noblemen of the Realm, without a Word of Burgeſſes. In a Preamble to the Laws of *Robert* III. Burgeſſes are mentioned for the firſt Time; and the Conjecture is, that many of the noble Families having been extinguiſh-ed, during the Struggles we had for Liberty againſt

againſt the two *Edwards* of *England*, King *Robert Bruce*, in order to recruit the Parliament, found it neceſſary to call the Royal Burrows to a Participation of the Government.

NOTWITHSTANDING of theſe ſpecious Facts and Obſervations, I am of Opinion, that the Royal Burrows made originally one of the Eſtates of Parliament. What determines me to think ſo, are the following Reaſons: In the firſt Place, they are the King's immediate Vaſſals, and therefore bound to Attendance equally with the Barons and Prelates; *Suit and Preſence* in the Superior's Courts being a Duty eſſential to every Feudal Holding, unleſs where expreſly remitted. *Secondly*, Attendance in Parliament, in old Times, being reckoned a Burden or Service, by no Means a Privilege, the Royal Burrows would not have obeyed a Summons from the King, unleſs they had been bound by their Holding. And our Kings were by no Means ſo abſolute, as by their mere Wills to intro-

duce a Regulation of this general and important Nature. And in the *third* Place, Suppoſing the King's Authority great enough to oblige the Burrows to ſubmit to this Encroachment upon their Privileges, we cannot ſuppoſe ſo wiſe and juſt a Prince as *Robert Bruce* would undertake ſuch a violent Meaſure, not only without Neceſſity, but where a more natural Remedy was at hand. For if many noble Families were extinguiſhed, their Eſtates ſurely were not, which falling to the Crown, by the Suppoſition, through the Failure of Heirs, were an ample Fund for increaſing the Number of Crown Vaſſals to fill the Parliament. *Laſtly*, 'Tis preſumable the Commerce of Land had crept in before this Time, and that the Crown Vaſſals were rather more numerous than formerly. It is certain, they were ſo greatly multiplied the very next Century, that it was thought expedient to exempt the ſmaller Barons from their Attendance.

And in Anſwer to what is urged on the other Side, the *Reddendo* of Watching and Warding proves nothing; many Services being due which are not expreſt in the Charter. Witneſs the common Stile of Ward-holding, *Reddendo ſervitia ſolita et conſueta.* It has a ſtronger Appearance, that Royal Burrows have been all along exempted from attending the County Courts. But this Indulgence, and the having a Court peculiar to themſelves, *viz.* the Chamberlain Court, will not infer their Exemption from Parliaments, where Laws are made binding upon the whole Kingdom; whereas judicial Proceedings were the only Subject-matter of Chamberlain Ayrs, nothing being there tranſacted relating to public Policy or Government.

Tho' there is no Mention of calling Burgeſſes to the *Engliſh* Parliament before the 49. *Henry* III. it appears to me a very lame Inference, That the Practice began at this Time, when we find the Records of preceeding Tranſactions ſo imperfect. At the ſame Time,

Time, were theſe Records entire, and were there no Inſtance before that Period of a Writ directed to the Sheriff for calling Burgeſſes to Parliament, it would not follow, that the Royal Burrows were no ſooner aſſumed as a Branch of the Legiſlature. This muſt be explained. It is mentioned above, to have been the Practice in King *John*'s Days, to call only the greater Barons by Name, and to leave the leſſer Barons and Freeholders to be ſummoned by the Sheriffs edictally, or in general Terms. Probably the Repreſentatives from Burrows were ranked with the leſſer Barons, and not honoured with a perſonal Citation. When the Attendance of the ſmaller Barons came to be diſpenſed with, upon their ſending Repreſentatives, this Change in the Conſtitution introduced an Alteration in the Stile of the Writs directed to the Sheriffs. Inſtead of the old Form, enjoining the Sheriff to notify publicly the Holding of the Parliament, that all who were bound might attend, he was commanded ſpecially to return two Knights of the Shire: This made it neceſſary

to

to be equally ſpecial with regard to the Repreſentatives of the Burrows; and therefore, in the Writ, he was directed to return two Knights and two Burgeſſes: This Circumſtance therefore proves nothing further than that in *Henry* III's Time, the Stile of the Writ was changed and made ſpecial, when it was before in general Terms. But further, the Circumſtances of the Caſe are a ſtrong Evidence to me, that this was not the firſt Time the Attendance of the Burrows in Parliament was required. Hiſtorians mention, that this Parliament was called by *Montfort*, in order to purge himſelf of a Suſpicion, which was gaining Ground, of his aiming at the Crown. It is not ſaid he had any particular Connection with the Burrows, to make their Preſence of Uſe to him; and unleſs it were in ſome ſuch View, I cannot imagine, that *Montfort* would, in theſe tickliſh Circumſtances, think of making any Alteration in the Conſtitution. At the ſame Time, the plain and ſimple Stile of the Writ proves it to have been a common and known Writ of the Law of *England*.

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Had any thing extraordinary been enjoined, it muſt have been introduced with a Preamble to ſupport the Command; eſpecially, as this was not a Matter of Courſe, but a Summons, which the Burrows were not bound to obey.

I HAVE been the fuller upon this Point, as it tends to aſcertain what was the original Conſtitution of Parliament, that all the King's Vaſſals, and no other Vaſſals, were the conſtituent Members. As perſonal Attendance was required, there was no Place for Repreſentatives, unleſs from the Burrows. It would have been an Hardſhip intolerable, to oblige the whole Community to perſonal Attendance; and therefore we may well ſuppoſe, that in all Times this Attendance has been diſpenſed with, upon ſending a few of their Number to repreſent them. This was originally the only Repreſentation, properly ſo called.

THUS we ſee how the ſmall Crown Vaſſals came to be freed from attending Parliaments,

ments, both in *England* and *Scotland*. In *Scotland* theſe Vaſſals had ſo little Attention to the Public, that they were ſatisfied with their Exemption, without thinking of fulfilling the Condition by ſending Repreſentatives, 'till the Regulation was enforced by a new Law; of which afterwards. Probably in *England* the Caſe would have been the ſame, but for the peculiar Circumſtances of the Times. One thing appears, that in a Parliament held by *Henry* III. *anno* 1258, there were but twelve Repreſentatives from the ſmall Barons. Yet ſoon thereafter, the Struggles betwixt the King and his great Barons drawing to a Head, there were in the Parliament 1264. no fewer than four Knights for each County. This full Repreſentation was probably occaſioned by the Anxiety of the Barons, deſiring a numerous Aſſembly to give Weight to their Proceedings. And the Regulation having once taken Place, would readily be kept up, without any new Impulſe, with the Difference only of more or fewer Repreſentatives from each County.

The ſending of Repreſentatives, in place of the ſmall Crown Vaſſals, was but one Step towards eſtabliſhing the Houſe of Commons of *England* in the Form it now ſubſiſts. Tho' the King's Vaſſals conveened in Parliament, were diſtinguiſhed into three Eſtates, the Spiritual Lords, the Temporal Lords or Barons, and the Repreſentatives from the Royal Burrows, we muſt not be deceived as if they made three different Bodies: They were all equally the King's Vaſſals, and compoſed but one Body politic, which ſat and voted in one Houſe. And this Form continued in *Scotland* ſo long as our Parliament ſubſiſted, after we had Repreſentatives from Shires as well as before. In *England*, for many Centuries, the greater Barons have made one Body, the Repreſentatives from the Shires and Burrows another, who ſit in different Houſes, and debate and vote ſeparately. At what Period was this Form eſtabliſhed is altogether unknown, ſo far as I can learn; tho' the thing be extremely remarkable, by the Change it has made in the Conſtitution of the *Engliſh* Government.

vernment. This only is certain, that there were two Houſes of Parliament before the 1376; for, in a Parliament held that Year *Peter de la Mare* is mentioned by Hiſtorians as Speaker of the Houſe of Commons, which is a pretty ſtrong Evidence, that the Commons were at that Time ſeparated from the Peers, having a Preſident or Speaker of their own; for one Body cannot readily admit of two Preſidents.

As this Diviſion of the *Engliſh* Parliament into two Bodies, was no neceſſary Conſequence of ſubſtituting Repreſentatives, in place of the numerous Body of Electors, I am apt to imagine, that the Difficulty of accommodating all the Members in one Place has occaſioned the Separation. Parliaments were of old ambulatory. Scarce a great Town in *England* but, one Time or other, has been honoured with a Parliament. However ill accommodated, there were no Means for a Separation, while all the Crown Vaſſals ſat in their own Right: for they could not think of making a ſeparate

Body of a few Repreſentatives from Burrows. But after Repreſentatives were introduced, in place of the ſmall Vaſſals of the Crown, a Diviſion into two Bodies was readily practicable, by placing the Spiritual and Temporal Lords in one Room, the Repreſentatives from the ſmall Crown Vaſſals and from the Burrows in another. This Practice probably had its Beginning in Towns where no ſingle Room was found large enough to accommodate the whole Body, and has been kept up in other Towns, where there was not the ſame Neceſſity, poſſibly by the Authority of the Peers, upon whom it conferred an additional Luſtre. The Silence of Hiſtorians favours this Conjecture. Had this Diviſion of the Parliament been the Reſult of any ſolemn Act, whether of the Parliament itſelf, or of the King and Council, ſuch a Regulation could not readily have eſcaped Notice. However this be, the ſplitting of the *Engliſh* Parliament into two Bodies, laid the Foundation of a great Change in the Conſtitution. And this Event, among many, is an Inſtance of Revolutions which

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ſpring from the moſt accidental or tranſitory Circumſtances, and for that Reaſon extremely obſcure in their Origin, however grand in their preſent Appearance.

As our *James* I. was perfectly well acquainted with the *Engliſh* Conſtitution, by his long Reſidence in *England*, it appears to have been his Plan to introduce into his own Kingdom many of the Laws and Cuſtoms of that Country. What we have at preſent to take Notice of, are contained in the above mentioned Statute, Act 101. Parl. 1427. *1ſt* exempting the ſmall Barons and Freeholders from Attendance in Parliament, upon Condition of ſending Repreſentatives; *2d*, making theſe Repreſentatives perhaps, with the Repreſentatives from the Burrows, a ſeparate Body, which appears from the Regulation appointing a Preſident to be choſen, called the common Speaker of the Parliament; *3d*, enacting that the Prelates and Peers ſhould be called to Parliament *nominatim* by ſpecial Precepts. Touching the firſt of theſe Regulations,

ons, of which mention has been made above, we don't find that the Act took Effect. The ſmall Vaſſals of the Crown, who had their own more than the public Intereſt at Heart, laid hold of the Exemption given them, without thinking of ſending Repreſentatives, becauſe theſe Repreſentatives were to be ſubſiſted at the Charge of their Conſtituents. And the Prelates and great Lords, in whom the Power of the Parliament centered after this Regulation, had no Intereſt to enforce it. The King indeed had an Intereſt, in order to balance the exorbitant Power of the Nobles; but in theſe rude Times this was overlooked, inſomuch that a Statute was obtained in the Reign of *James* II. *viz.* Act 75. Parl. 1457, relieving all Freeholders from Attendance, whoſe yearly Rent did not amount to 20 *l.* without a Word of their being obliged to ſend Repreſentatives. Matters continued upon this Footing till the Days of *James* VI. ſave that by the Act 78. Parl. 1503. all were exempted from Attendance whoſe Rent was within One hundred Merks. The Reformation

tion greatly increaſed the Power of the Nobility, as it almoſt extinguiſhed the Prelates. The Abbacies were totally demoliſhed; and but few of the Biſhops frequented the Parliament. By this Means the Nobility had all in their Power: They oppreſt the Burrows, and were too ſtrong for the King. Thus the Government became purely Ariſtocratical, and ſtood in need of ſome Regulation to bring it to its former Poiſe. Had the Act of *James* I. been followed out, in the ſame Manner as the like Regulation was followed out in *England*, this Evil would have been prevented: and now the only Remedy was to revive that Act. The Surpriſe is, that a Majority was found among the Nobility, to countenance a Regulation, which behoved remarkably to abridge their Authority. It appears from the Statute which is the 114. Parl. 1587. that great Oppoſition was made. The Attendance of the ſmall Barons in Parliament was ſo thoroughly in Deſuetude, that they could not now think of reſuming as a Privilege, what they had ſo long been exempted from, conſidered as a Service,

Service. But it had all along been underſtood to be the Prerogative of the Crown, acknowledged in every Statute relating to the Parliament, that the King might call, by ſpecial Writ, any of his Vaſſals he had a-mind, notwithſtanding of their Exemption. Probably this has been the Inſtrument made uſe of by the King's Miniſters, to gain the End propoſed: The Nobles would be told, that if they voted againſt the Regulation, the King would uſe his Privilege of calling to Parliament a Number of his ſmall Vaſſals, ſufficient to over-balance the Nobility. As this is but mere Conjecture, it is ſubmitted to the Judgment of others. One thing is certain, that the Act 1427. was revived, and the ſmall Barons ſent Repreſentatives to Parliament from that Period downwards.

I HAVE mentioned above, that it was a Part of the Plan of *James* I. to divide his Parliament into two Bodies, as in *England*. This was not followed by *James* VI. for our Parliament continued one Body to the End.

It

It is left to conjecture, whether this was of Design. or by Accident; for our Historians are extremely defective upon our civil Transactions. We have no Occasion to go further than to *England*, to learn what Influence it has upon the Constitution to divide a Parliament into two Houses; and as it was a politic Age, this of *James* VI. I am apt to believe, it was not without Design, that the Parliament of this Kingdom was continued upon its old Footing. This is a curious Subject, and deserves to be attended to. It is pretty obvious, that the King's Negative against a Regulation agreed to by both Houses is not a very valuable Privilege. The Opinion of the two Houses, being understood the Sense of the Nation, has rather too great Force to be resisted by the *Veto* of any single Man, the King not excepted. His refusing an Assent in such a Case, is virtually declaring himself against the Interest of his People. But an *English* Monarch is seldom brought under this Dilemma. If he can but get a Majority in either House on his Side, the Work is done.

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He may appear to be neuter. Thus taking the Parliament complexly, a great Majority may be againſt the King, bent, we may ſuppoſe, to fetter him by new Limitations; and yet he may ward the Blow, can he but procure a ſcrimp Majority in either Houſe for him. This cannot happen where the Parliament makes but one Body, as in *Scotland*. So far the Advantage lyes on the King's Side, where the Parliament is compoſed of two Bodies. But to balance this, the ſame Advantage lyes on the Side of the People, where the King's Views are to enlarge his Prerogative by Authority of Parliament; for a ſcrimp Majority in either Houſe, interpoſing a *Veto*, fruſtrates his Deſign. In a Word, a ſingle Body gives great Opportunities of making Encroachments on either Side; whereas, ſuppoſing the Conſtitution to be ſound and entire, it is beſt preſerved ſo, by a Parliament compoſed of two Bodies.

So far the Scales ſeem to hang upon the Level. But then ſeldom is a Nation ſo united,

ted, as to think of making Encroachments upon the Prerogative Royal: Whereas the King, a ſingle Perſon, has many Opportunities, and ſeldom wants Inclination to enlarge his Powers. King *James* and his Miniſters could not but be ſenſible of this, and therefore a ſingle Body was their Game. But the Contrivance lay a little deeper; and this may be diſcovered, by attending to one Branch of the Conſtitution of the Parliament, peculiar to *Scotland*. At what Time it was that the Lords of the Articles were eſtabliſhed, is uncertain. But as the Seſſions of our Parliament were generally very ſhort, it was found neceſſary, when Buſineſs multiplied, to elect a certain Number out of every State, to prepare and digeſt Matters that were to be laid before the Parliament, for their Determination. This ſelect Body was called the Lords of the Articles; and ſuch was the eſtabliſhed Practice, that no Buſineſs could be laid before the Parliament, but what was prepared by theſe Lords. This was in Reality a Negative before Debate, which is of vaſtly greater Im-

portance than the King's Negative after; and the worſt of all is, that there was no Remedy, in our Conſtitution, againſt the Partiality of the Lords of the Articles, however glaring it might be. A Body thus conſtituted, could not fail in Time to engroſs the whole Power of the Parliament. And in Fact it came to this at the Long-run, that Parliaments commonly ſat but two Days. On the firſt Day of their Meeting, they choſe the Lords of the Articles, an equal Number out of each Eſtate, to whom the King joined eight of his Crown Officers. Theſe received all the Grievances or Articles that were brought to them, and formed them into Bills, or rejected them at their Pleaſure. When all Matters were ready, the Parliament ſat another Day, and approved or rejected the Bills that were laid before them.

SUCH was the Practice in the 1587, when the Act of *James* I. was revived. The King had a fair Chance to ſecure the Lords of the Articles for him, whether by influencing their Election,

tion, or by gaining them over after they were elected. At any Rate eight Officers of State, devoted to the King, muſt have had great Influence in ſo ſmall a Body. By this Means the King was pretty ſecure, that nothing could be brought into Parliament without his Approbation. But even this Security was not reckoned ſufficient. About this very Time, or ſoon after, a Scheme was laid and executed to improve upon the above Regulation. Under Pretext of the Lords of the Articles not having ſufficient Time to overtake the Multiplicity of Affairs laid before them, four Perſons were to be named out of each Eſtate, whoſe Province it was to meet Twenty Days before the Parliament, to receive all Supplications, &c. to reject what they thought frivolous or improper, and to digeſt into a Book what they choſe to lay before the Lords of the Articles. This was done by the Act 218, Parl. 1594. The Act may be thought defective, as no Proviſion is made in it for the Choice of this ſelect Body. But this was purely an Artifice. It would have been too bare-

faced

faced to have named the King openly; for it was the ſame with giving him a Negative before Debate. And yet it muſt have been obvious, that the Choice behoved to reſt upon the King; for a Body that was to meet before the ſitting of the Parliament, could not poſſibly be choſen by the Parliament. But as if this were not fully ſufficient to lodge with the Crown the Power of directing Matters that were to be brought into Parliament, it is further declared "to be the Privilege of "the King, to bring directly into Parliament "all Matters concerning himſelf, or common "Good of the Realm."

THIS Statute was too manifeſt an Encroachment upon the Liberty of the Subject to be patiently ſubmitted to. It has for that Reaſon been dropt; for I cannot otherways conceive, what Need there was for the Artifice made Uſe of by the Miniſters of *Charles* I. in the Parliament 1633, to ſecure the Lords of the Articles for the Crown; to wit, that the Biſhops ſhould chuſe eight Peers, and the

Peers

Peers eight Biſhops; and that the Sixteen elected of the Biſhops and Peers ſhould jointly chuſe eight Barons and eight Commiſſioners for Burrows. With theſe were joined the Officers of State; and thus were the Lords of the Articles conſtituted, the Chancellor to be Preſident in all their Meetings. The Artifice here is obvious. The Biſhops were univerſally in the Intereſt of the Crown, as they have been at all Times; and upon all Occaſions. The eight Peers elected by them were ſure Cards for the Crown, ſuppoſing but eight of ſo numerous a Body capable of ſuch a Bias. As the whole Biſhops were for the Crown, it was indifferent which Eight were choſen; and we may be certain, that none would be choſen out of the Commons, but what were for the King's Purpoſe, when ſuch were the Electors. This Method we may believe was not practiſed by the Parliaments during the Troubles. So far from it, that the above mentioned Statute 1594 is expreſly reſcinded in the Parliament 1640. It was judged too bold a Step to revive it after the Reſto-

Reſtoration. But as the Parliaments both in *England* and *Scotland*, which were called upon the Reſtoration, were abundantly obſequious to the King's Meaſures, another Scheme was ventured upon very little more diſguiſed, which was to enact into a Law the Contrivance fallen upon in the 1633, to ſecure the Lords of the Articles for the Crown. This was done by the firſt Act, Parl. 1663. And thus by the Conſtitution of the *Scots* Parliament, nothing could be brought under Deliberation but by the King's Authority, or, which is the ſame, by the Authority of his Creatures the Lords of the Articles, which was an abſolute Bar to all Hopes of any Laws for ſecuring the Liberty of the Subject. On the other hand, he had a much better Proſpect of carrying through Laws for his own Benefit, than he had in *England*. A Majority did his Affair, which did not always anſwer in the other Kingdom. For ſuppoſing, upon the whole, a Majority for the King, yet if there

was

was a ſcrimp Majority in either Houſe againſt him, nothing could be carried on.

For my Part, I ſhould have thought it leſs criminal, in our Reſtoration Parliament, to have openly beſtowed upon the King a Negative before Debate, than, in ſuch an under-hand artificial Manner, to betray their Conſtituents and Nation. This will ſtand as a Monument of the wicked Enterpriſes of Miniſters, and of the Venality of our Parliaments; and long may it ſtand, if it do but ſerve as a Warning to guard us againſt ſuch opprobrious Devices, if ſuch ſhall ever again be attempted againſt us.

Touching the third Article of the Regulations introduced by the Statute 1427. that the Prelates and Peers ſhould be called to Parliament by ſpecial Precepts, we muſt recapitulate in a few Words what has been ſaid above, upon the *Engliſh* Form of calling a Parliament. Originally Parliaments were called by iſſuing Brieves out of the Chancery to the

the ſeveral Sheriffs, directing them to ſummon publicly, or edictally, all thoſe who were obliged to attend the Parliament. A public Notification, probably at the Market-Croſs of the Shire, was thought ſufficient. Over and above this general Summons, which comprehended all the Ranks equally, a Form was introduced, in the Reign of King *John*, of writing Letters to the Prelates and great Lords by Name, acquainting them of the Time and Place of holding the Parliament, and requiring their Attendance. When Repreſentatives were introduced in place of the ſmall Barons, the general Summons was laid aſide as uſeleſs. The great Barons were called by ſpecial Letters, and the Brieves, now directed to the Sheriffs, came to be more ſpecial, ordering them to return two Knights out of every Shire, and two Burgeſſes out of every Burgh; which Form is continued down to this Day. In *Scotland* the ſmall Barons, laying hold of their Exemption, without ſending Repreſentatives to Parliament, the general or edictal Citation continued in Uſe as formerly,

with

with this Addition only, that, beſides the general Citation, Letters came to be directed to every one of the great Lords in particular. There was not the ſame Neceſſity here to alter the Form of Citation, that there was in *England*: The general Summons anſwered the Purpoſe now as well as formerly; for, not comprehending any but who were bound to give Attendance, it readily accommodated itſelf to the new Regulations, exempting from Attendance thoſe whoſe yearly Rent was under a certain Sum. That the general and ſpecial Summons were uſed at the ſame time, is clear from an Order of *James* III. entered in the Records of Parliament 21ſt *Feb.* 1487. for diſſolving the Parliament, and calling a new one. The Words are; "We do you "to wit, that our Sovereign Lord, by the "Advice of his Council, has, for certain rea-"ſonable and great Cauſes deſerted and diſ-"ſolved his Parliament, that was continued "of before to the 5th of *May* next to come, "and has ordained a new general Parliament "to be ſet, and proclaimed to be holden at

"*Edinburgh* the 12th Day of *May* next to "come, with Continuation of Days, and ge-"neral Precepts to paſs to all Lords, Prelates, "Barons, Freeholders and Commiſſaries, and "with ſpecial Letters under his Signet, to all "the Prelates and great Lords of his Realm, "to ſhew and declare to them the Cauſe of "the ſitting of his ſaid Parliament."

I HAVE annexed a Copy of the Brieve iſſued out of the Chancery for an edictal Citation, but I have not been ſo lucky as to find anywhere the Form of the ſpecial Precept under the Signet. Probably this Precept has fallen by Degrees into Diſuſe, and the calling of the Parliament been left to the edictal Citation, comprehending all Perſons who were bound to give Attendance. What confirms me in this Opinion is the Statute 1587, ſo often above mentioned, directing Commiſſioners to be choſen for each Sheriffdom, and their Names to be notified to the Director of the Chancery. The Form of calling theſe Commiſſioners to Parliament is expreſt in the Statute,

Statute, "That the ſaid Commiſſioners be "warned at the firſt, by virtue of Precepts "forth of the Chancellary, or by his High-"neſs's miſſive Letters: And in all Time "thereafter by Precepts of the Chancellary, "as ſhall be directed to the other Eſtates." At this Period it would appear there was no other Precept in Uſe but that iſſued out of the Chancery, *viz.* the Brieve directed to the ſeveral Sheriffs, ordering a general or edictal Summons. And this Brieve alſo was afterwards laid aſide, and in Place of it Parliaments were conveened by the King's Proclamations.

THE Form of calling a *Britiſh* Parliament, ſo far as concerns *Scotland*, is appointed by particular Statutes. In order to the electing of the ſixteen Peers, a Proclamation is iſſued under the Great Seal of *Great Britain*, commanding all the Peers of *Scotland* to aſſemble at ſuch Time and Place, as is appointed in the Proclamation, then, and there to elect the ſixteen Peers: And the Proclamation muſt be

be duly publiſhed at the Market-Croſs of *Edinburgh*, and in all the County Towns of *Scotland*, Twenty-five Days before the Meeting for Election, 6th *Anne* 22. The like Proclamation might have ſufficed for the Meeting of the Freeholders in every County, to chuſe their Repreſentatives; but a different Form was choſen, and reaſonably, being more analogous to the Practice of *England*. Brieves or Writs under the Great Seal of *Great Britain*, are directed to the ſeveral Sheriffs and Stewards, who, on Receipt thereof, muſt furthwith give Notice of the Time of Election of the Commiſſioners for Shires; and, at the Day appointed, the Freeholders muſt conveen at the Head-Burgh of their Shire or Stewartry, and proceed to the Election of their Commiſſioner. And the Clerk of the Meeting muſt immediately return the Name of the Perſon elected to the Sheriff or Stewart, who ſhall annex it to his Writ, and return it with the ſame into the Court out of which the Writ iſſued. By Authority of the ſame Brieve or Writ, the Sheriff or Stew-

art

art muſt furthwith direct a Precept to every Royal Burgh within his Juriſdiction, commanding them furthwith to elect a Commiſſioner, as they uſed formerly to elect Commiſſioners to the Parliament of *Scotland*, and appointing the Commiſſioners to meet at the preſiding Burrow of the Diſtrict, upon the 30th Day after the Day of the Teſte of the Writ, there to chuſe their Burgeſs for the Parliament. And the common Clerk of the preſiding Burrow muſt immediately, after the Election, return the Name of the Perſon elected to the Sheriff or Stewart, who ſhall annex it to his Writ, and return it with the ſame, as aforeſaid, 6th *Anne* 5.

By an edictal or general Summons one Benefit ariſes to the Subject, which has not been attended to when the Statute 1587 was made, otherways 'tis probable this Form of Summons would have been laid aſide, and that of perſonal Citation taken up; for which there was the better Colour, that it was but following out the Plan laid down by *James* I. Upon

on an edictal Citation, every Baron who has a Seat is intitled to appear in Parliament, becauſe he is called. But by a perſonal Citation, Opportunity is given to drop out of the Liſt any particular Baron the King is not pleaſed with. Attendance in Parliament is a perſonal Service, which cannot be performed by the Vaſſal, unleſs the Superior chuſe to accept of it, and for this Reaſon it is not due, unleſs demanded. A Baron therefore, who is not called, cannot regularly take his Seat in Parliament. This Matter is well underſtood in *England*, where many Times the Advantage has been laid hold of, which a perſonal Citation gives the King. One remarkable Inſtance there is in a Parliament conveened by King *Henry* III. *anno* 1255, when a great many Lords were omitted to be ſummoned who were not in the King's Intereſt. Nor at this Day do I know of any Remedy provided againſt the Evil, other than the Danger that would ariſe to the Conſtitution, if Liberties of this Kind were taken, which, tho' ſtrictly

legal

legal, could not fail to alarm the whole Nation, as evidently ſubverſive of the Conſtitution.

The Preamble to the Statutes of *Robert* III.

PArliamentum Domini noſtri Roberti tertii Scotorum Regis illuſtriſſimi, tentum apud Sconam die lunæ viceſimo primo Februarii: anno gratiæ milleſimo, quadringenteſimo, regni ſui undecimo, cum continuatione dierum ſubſequentium: ſummonitis et ibidem vocatis more ſolito, Epiſcopis, Prioribus, Ducibus, Comititbus, Baronibus, Libere-tenentibus et Burgenſibus, qui de Domino noſtro Rege tenent in capite.

FORM of the WRITS for calling a Parliament in Scotland.

THE Parliaments of *Scotland* were of old called and conveened by Brieves directed forth of the Chancery; for iſſuing of which Brieves, there was an Act or Ordinance made by his Majeſty, with Advice of his Privy Council, for the Director's Warrant, in theſe Terms:

THE King's Majeſty, with Advice of his Council, has ordained an Parliament to be proclaimed to begin in the Burgh of Edinburgh *the* &c. *Day of* &c. *for ordering, treating and concluding of ſuch great Matters as inſtantly occurs concerning the King's Grace, the Well of this Realm, and the Lieges thereof: Therefore ordains the Director of the Chancery, to direct Precepts to all Prelates, Barons, Commiſſars and Bealzies of Burrows, and all others our Sovereign Lord's Freeholders within this Realm, charging them to compear*

pear the ſaid Day and Place, for their Advice to be had in ſuch Things, as at that Time, ſhall be propoſed to them.

WHEREUPON the Director gives out Precepts (or Brieves) as follows, whereof I ſhall only inſert one, directed to a Baillie, all the reſt being of the ſame Tenor, and differing in nothing but in the Deſignation of the Party to whom it is directed;

JACOBUS, Dei gratia, Rex Scotorum, Ballivo ſuo de Cowall, et deputatis ſuis, ſalutem. Quia ex aviſamento et deliberatione noſtri chariſſimi conſanguinei ac gubernatoris, ac dominorum noſtri conſilii, ordinavimus parliamentum noſtrum tenendum apud Edinburgum, et inchoandum tali die cum continuatione dierum; vobis præcipimus et mandamus, quatenus ſummoneatis, ſeu publice ſummoneri faciatis, omnes et ſingulos Epiſcopos Abbates, Priores, Comites, Barones et cæteros Libere-tenentes, totius Balliæ veſtræ, et de quolibet Burgo tres vel quatuor de ſufficientio-

ribus Burgenſibus ſufficientem Commiſſionem habentibus, quod compareant coram nobis dictis die et loco in dicto noſtro Parliamento, una cum aliis regni noſtri Prælatis, Proceribus, et Burgorum Commiſſariis, qui tunc ibidem propter hoc intererunt congregati, ad tractandum, concordandum, ſubeundum, et determinandum ea, quæ in dicto noſtro Parliamento, pro utilitate regni noſtri et Reipublicæ tractanda fuerint, concordanda, ſubeunda, et determinanda; et vos ſitis ibidem dicto die, habentes vobiſcum ſummonitionis veſtræ teſtimonium, et hoc Breve. Et hoc ſub pœna quæ competit in hac parte, nullatenus omittatis. Datum ſub teſtimonio magni noſtri Sigilli, apud Edinburgum penultimo die menſis Maii, anno regni noſtri ſecundo.

Ballivo de Cowall pro Parliamento.

This Precept was under the Teſtimony of the Great Seal, which was then but very little, in white Wax.

FORM

FORM of the BRIEVE or WRIT for calling a Parliament in *Great Britain.*

GEORGIUS Dei gratia, Magnæ Britanniæ, Franciæ et Hiberniæ Rex, Fidei Defenſor, Vicecomiti Comitatus de Bute, ſalutem. Quia de aviſamento et aſſenſu concilii noſtri, pro quibuſdam arduis et urgentibus negotiis, nos, ſtatum et defenſionem regni noſtri Magnæ Britanniæ et Eccleſiæ concernentibus, quoddam Parliamentum noſtrum apud civitatem noſtram Weſtminſter, decimo die Maii proximo futuri, teneri ordinavimus; et ibidem, cum Prælatis, Magnatibus et Proceribus dicti regni noſtri colloquium habere et tractatum: tibi præcipimus firmiter injungendo, quod immediatè, poſt debitam notitiam prius inde dandam, unum Militem gladio cinctum, magis idoneum et diſcretum Comitatus prædict. per Liberè-tenentes ejuſdem Comitatus, qui electioni hujuſmodi intererunt, ſecundum formam ſtatuti in eadem caſu editi et proviſi, eligi facias. Tibi etiam præcipimus, quod de quolibet regali Burgo Comitatus

mitatus prædict, unum Commissionarium ad e-legendum unum Burgensem pro classe sive di-strictu, de discretioribus et magis sufficienti-bus, libere et indifferenter, juxta formam sta-tuti inde editi et provisi, eligi facias. Et nomina eorundem Militis et Burgensis, qui tibi forent retornata per clericos ad inde appun-ctuatos, in quibusdam indenturis inter te et il-los respective conficiendis, licet hujusmodi eli-gentes presentes fuerint vel absentes, inseri, eosque ad dictos diem et locum venire facias. Ita quod idem miles et burgensis plenam et suf-ficientem potestatem habeant ad faciendum et consentiendum his quæ tunc ibidem de com-muni consilio dicti regni nostri (favente Deo) contigerint ordinari super negotiis an-tedictis. Ita quod per defectum potestatis hu-jusmodi, seu propter improvidam electionem Militis et Burgensis prædictorum, dicta nego-tia infecta non remaneant quovis modo. No-lumus autem quod tu, nec aliquis alius Vicece-mes dicti regni nostri aliqualiter sit electus. Et electiones illas quæ tibi forent certifica-tæ et retornatæ ut præfertur, nobis in cancel-

lariam

lariam noſtram ad dictos diem et locum certifices, juxta formam ſtatuti, una cum hoc Breve. Teſte meipſo, apud Weſtminſter 14*to. die Martii, anno regni noſtri octavo.*

JEKYLL BALSTRODE.

Written on the Tagg thus,

Vicecomiti Comitatus de Bute, pro eligendo ad parliamentum decimo die Maii proxime tenendum.

JEKYLL BALSTRODE.

ESSAY

ESSAY III.

Honour. Dignity.

THERE is no Appetite in human Nature more prevalent nor more univerſal, than that for Honour and Reſpect. And the Pleaſure ariſing from it is of the moſt refined Kind; Honour and Reſpect being by Nature, a voluntary Tribute paid to intrinſic Merit. Hence it is, that no other Paſſion is naturally more friendly to Virtue. But tho' all Men are fond of Reſpect, the Bulk of Mankind, unable or unwilling to purchaſe it at ſuch a Price as that of real Merit, endeavour to ſecure it to themſelves at a cheaper Rate. Early Attempts were made to annex it to the Poſſeſſion of outward Advantages, and the Law has been called in Aid to ſupport the artificial Connection. Thus, what ought to be a Free-will Offering, is changed to a Matter of Right. We lay Claim to Honour, as if it were our Property, and as if, like Land or Goods, we were intitled to it by Law. And the World has improved ſo much upon this in-

indolent Scheme, that the different Degrees of Reſpect and Honour are nicely adjuſted by Cuſtom, both in Language and Behaviour, "Qualities and Virtues being aſſigned to Per-"ſons of Rank, under the Titles of *Graces*, "*Excellencies*, *Honours*, and the reſt of this "mock Praiſe and mimical Appellation," as is happily expreſt by an eminent Author.

In a moral View nothing can be more pernicious than this artificial Connection, as it robs Worth and Merit of their proper Reward, to annex it to the Goods of Fortune, which without it have but too great Influence. But conſidering the Matter politically, the fixing of artificial Marks of Worth, which every one can diſcern, may be juſtified. Government could ſcarcely ſubſiſt without them. Real Merit is ſo remote from vulgar Apprehenſion, that were Rulers to be choſen by this Standard, Differences and Diſſenſions would be endleſs.

How-

HOWEVER this be, here ariſes a Diſtinction betwixt Reſpect beſtowed from the Opinion of Merit, which may be called *natural Honour*, and Reſpect beſtowed upon the Poſſeſſors of Power and Riches, which may be called *artificial Honour*.

AMONG the Ancients, this artificial Honour was but in its Infancy; yet in old *Rome* we have a remarkable Inſtance of it. There was a Diviſion of the People into *Nobiles*, *Novi*, and *Ignobiles*, taken from the Right of uſing Pictures or Statues, an Honour allowed to ſuch only whoſe Anceſtors, or themſelves, had born ſome curule Office. He who had the Pictures or Statues of his Anceſtors, was termed *Nobilis*; he who had only his own, *Novus*; he who had neither, *Ignobilis*: So that *jus imaginis* was among the old *Romans* like the Right of bearing a Coat of Arms among us.

BUT this artificial Honour grew to a greater Height in Courſe of Time. Beſides

its Connection with the higher Offices in the State, as among the *Romans*, it came to be annexed to large Territories, and at laſt reſted upon Families, without Regard to Land or Office. This was the Caſe in all the *Gothic* Conſtitutions, and to theſe two Branches I ſhall confine myſelf, as they are the Foundation of our preſent Notions of Dignity and Honour.

In theſe *Gothic* Conſtitutions, Honour and Dignity were originally annext to Lands and Offices, and in no Caſe to Perſons or Families, independent of Lands and Offices.

Earl or Count was the Name given to the Governor of a Province. The Office was of great Power and Authority, and could not fail to have a conſiderable Share of Dignity annext to it. *Baſnage*, in his Cuſtoms of *Normandy*, obſerves, that Counts were the ordinary Judges of Provinces, that under *Charles* the Simple, they began to be hereditary, and that ſome few of them uſurped the Sove-

Sovereignty. In the ſame Way an Earl in *England* was the Judge or Governor of a Shire, and his Office as well as Dignity for Life only. *William* the Conqueror firſt made the Office feudal and hereditary, allotting the third Penny of all the Pleas determined in the Sheriff's Court, for Support of the Office. This Acceſſion of Wealth and Dignity had the ordinary Effect. Earls became too great to ſubmit to the Fatigue of Buſineſs. Deputes were appointed in every County, upon whom was devolved all the Drudgery Work of the Magiſtrate and Judge. And thus it commonly happens, that the Perſon who gets all the Pay, does nothing; while the Perſon who does all the Work, gets little or no Pay. After the Introduction of theſe *Deputes*, *Vicecomites* or *Sheriffs*, an Earldom was no longer conſidered as a territorial Office, but as a territorial Dignity, which carrying a good deal of Splendor with it, came to be a deſirable Object. As it no longer had any Relation to a real County or Sheriffdom, fictitious or imaginary Counties were erected,

erected, in order to beſtow the Title of *Earl* upon the Poſſeſſors. And theſe Titles by the Bounty of Princes, came to be multiplied exceedingly; it being obſerved with Regard to Ribbons, Titles, and ſuch like Marks of Diſtinction, which take nothing from the Granter, that of all Favours, they are beſtowed with the beſt Grace. Rare Invention, this, to reconcile, in ſo happy a Manner, the Intereſts of the Giver and Receiver.

It is obſerved above, that in the *Gothic* Conſtitutions, Honour and Dignity were annext to Lands as well as to Offices. In *England* a great Eſtate held of the King, with Power of Juriſdiction, *&c.* and a *Reddendo* of ſo many Knights to ſerve the King in his Wars, commonly ſtiled *a Barony*, had Dignity or Honour annext to it; and from this artificial Connection, it alſo got the Name of *an Honour*, the Honour of *Richmond*, for Example, of *Woodſtock*, &c. And the Family here was ſo little regarded, that whoever purchaſed ſuch an Eſtate, with the King's Conſent,

ſent, to be held of the Crown, was of Courſe, conſidered as a Baron, or Perſon of Honour.

ORIGINALLY the Union of Lands, erected into an Earldom or Barony, was conceived to be ſo intimate, that it became as it were an identical Subject, not capable of Diviſion or Separation into Parts. And hence, in the old Law of *England*, it was a Rule, that a Barony could not be ſplit into Parts, but that the whole behoved to be aliened together.

BUT this being a ſtrained Conception, repugnant to more plain and natural Ideas, eſpecially where Parts of an Earldom or Barony are locally diſtinct one from another, Nature prevailed over Art, and diſpoſing of Parts of a Barony crept into Practice.

FOR ſome time after this Sort of Commerce was introduced, territorial Honour was not much affected by it. The Earldom or Barony ſtill remained in a great Meaſure entire with the Dignity annexed to it. But when, by

by the Arts of Peace, and Increaſe of Induſtry, Lands came to be more univerſally the Subject of Commerce, readily paſſing from Hand to Hand, territorial Honour behoved to be in an uncertain State. Let us ſuppoſe, that an Earldom or Barony has been poſſeſſed for Ages by the ſame Family. The Family falling into Decay, the Eſtate is diſmembered Piece-mail, 'till little or nothing is left of it. What is become, in the mean Time, of the Dignity or Honour originally annexed to the Eſtate? For the Eſtate being ſplit into ſmall Parts, and poſſeſſed perhaps by mean Perſons, the Honour cannot follow any of the Parts. Is the Idea then loſt and gone? If it does ſubſiſt, where is the Object? The Anſwer is, That it is transferred from the Eſtate to the Family; and the Tranſition is eaſy and natural. For tho' Poſſeſſion of the Earldom or Barony, is the Foundation of the Reſpect paid to the Family, yet the Family being the immediate Object, Reſpect is paid by the Vulgar without attending to the legal Title, and is continued to be paid even after the Title is gone.

gone. Thus in *Germany*, territorial Titles of Honour are communicated to every Branch of the Family, tho' poſſeſſed of no Land Property; and therefore, no Wonder, that in *Britain*, they ſhould remain with the chief Branch of the Family, after the Eſtate is dilapidated.

One Thing did greatly contribute to change the Nature of Honour, by transferring Honour from Land to Families. It was *Malcolm Canmore*, who, in Imitation of *William* the Conqueror, introduced the territorial Dignities of Earl and Baron, which produced Sirnames not formerly in Uſe. *Malcolmus tertius, ſublato Maccabæo Tyranno, Regnum legittime ſibi debitum, occupavit, quod, ut ornaret, unicâ curâ incubuit; tunc et a Prædiis nobilibus nomina quiſque ſumpſit, et cum magna frequenſque nobilitas S. Margaretam ex Hungaria et Anglia ſecuta, in Scotia conſediſſet, ſplendorem novo ſuo Principatui additurus, Barones et Comites creavit. Dempſter*, p. 120. The Uſe of Sirnames had undoubtedly

edly the Effect to make a closer Union among the several Parts of the compound Idea of a Family, by binding all these Parts together under one common Name; which tended to facilitate the Connection betwixt a Family and a Title of Honour, and made it as easy for the Mind to rest upon a Family for the Object of Honour, as upon an Estate.

It will be obvious, that this Change in the Nature of Honour, from territorial to personal, behoved to come on by Degrees. Even after frequent Instances of the Title remaining with a Family, when the Estate was entirely or mostly dismembered, the Case would be different, when the Earldom or Barony was disponed whole and entire; for there the Honour for many Ages, was certainly transferred with the Estate. Opposite Instances behoved to breed a Confusion and Darkness in the Idea of Honour, being sometimes applied to Lands, sometimes to Families, independent of Lands. The Mist is cleared up by Course of Time. The Notion of territorial

rial Honour is quite wore out, and at preſent we have no Example of Honour, but what is perſonal, and annexed to Families, independent of Land. I have heard of no Exception in this Iſland, unleſs it be with relation to the Caſtle of *Arundel*, which at the ſame Time appears to be a doubtful Inſtance.

THO' territorial Honours be now at an End, there remains one remarkable Conſequence of them, which is in full Obſervance. It is a Maxim in Law, that the King is the Fountain of Honour, and that it is the Prerogative of the Crown to beſtow Honours and Dignities of all Kinds. It is not difficult to come at the Foundation of this Privilege. Tho' it anciently was the Privilege of every Superior to unite diſcontiguous Lands into one artificial Subject, in favours of his Vaſſal; no Superior could unite Lands into an Earldom or Barony, ſave the King, for a plain Reaſon, that it is not called an Earldom or Barony, unleſs it hold of the King. The Honour which followed this Erection or Cre-

ation was underſtood to flow from the King; and as the King's Conſent, *qua* Superior, is requiſite for tranſmitting an Earldom or Barony to a Purchaſer, hence the King came to be conſidered as the Fountain of territorial Honour, in the ſame Manner as he is the Fountain of official Honour, by his Power of appointing the Officers of the Crown. Taking the Matter ſtrictly, it was not the King who beſtowed the Honour, but the People. Nothing flowed from the Crown, but the Office or the Barony, which carrying great Power and Preheminence, were naturally attended with Honour and Reſpect. And ſuppoſing Honour to be a legal Acceſſory of a Barony or Office, it will not follow, that the King can create Honour, independent of a Barony or Office, which would be creating an Acceſſory without a Principal. But our Forefathers were by no Means accurate in their Conceptions: And from the King's Power of beſtowing the Means of acquiring Honour, to infer a Power of beſtowing Honour independent of theſe Means, is no bet-

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ter Reaſoning, than to infer a Man's Power of beſtowing Knowledge without any Means, from his Power of beſtowing Riches, which are one good Mean to acquire Knowledge. Yet upon this, and no better Foundation, is the King's Power built, of beſtowing perſonal or Family Honours, when theſe, by Degrees, came to be ſubſtituted in Place of the other.

And thus a new Diſtinction was, by Degrees, introduced, betwixt Honour annexed to Land or Office, and Honour annexed to Perſons, whether a ſingle Perſon or Family. And this latter Sort of artificial Honour, I ſhall take the Liberty hereafter to call *perſonal Honour*, tho' very different from that Reſpect and Deference which is voluntarily paid to certain Perſons, from the Opinion of real Worth.

There are preſerved in *England* many old Charters of the Creation of Earls, which uniformly run in the Stile of a Grant of an Office. When by the Multiplication of

Earls

Earls beyond the Number of Sheriffdoms, an Earldom ſunk down to a mere territorial Dignity, the Stile of theſe Charters was varied, and the common Form was to erect Lands into an Earldom, in favours of the Grantee and his Heirs, which was underſtood to be all that was neceſſary to beſtow upon him the territorial Dignity. Afterwards, when the Notion of perſonal Honour crept in, certain Solemnities were uſed at the Creation of a Peer, ſuch as girding him with a Sword, covering his Head with a Cap of Honour and Circle of Gold, all of them Marks of perſonal Reſpect. And now, both in *England* and *Scotland*, the Notion of territorial Honour being quite wore out, an Earl's Patent is ſo framed, as to import a mere perſonal Dignity, without relation either to Office or to Land.

With Regard to *Scotland*, the oldeſt Patent of an Earl I have ſeen, is that granted to *Ranulph* Earl of *Murray*. King *Robert* I. grants certain Lands to him, and to the Heirs-

male

male of his Body, to be held of the Crown *in libero comitatu*. As no other Form or Ceremony was uſed in creating this Gentleman an Earl, the Charter is full Evidence, that in thoſe Days the Title of an Earl was conſidered as merely a territorial Dignity. A Copy of the Charter is annext for the Satisfaction of the curious. Another Charter I have read of by King *David* II. "in Favours of Sir "*Malcolm Fleming* Knight, and of the Heirs- "male of his Body, for his Homage and "worthy Services, of the Lands of *Farynes*, "*Deall*, *Rynos*, and the Burgh of *Wigtoun*, "with their whole Pertinents, and all the "King's Lands of the whole Sheriffdom "of *Wigtoun*, with the Advocation of the "Churches, and Right of Patronage of the "Monaſteries and Abbacies exiſting within "the Sheriffdom; reſerving to his Majeſty the "Right of Patronage of the Epiſcopal See of "*Whyteborn* or *Galloway*. And alſo becauſe "the ſaid Place of *Wigtoun* was lookt upon as "the principal Mannor of the whole She- "riffdom of *Wigtoun*, the King ordained, "that

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" that the ſaid *Malcolm* and his Heirs ſhould " for ever take the Name of *Earl*, and be " called the Earls of *Wigtoun*. Further, the " ſaid Lands are erected into a free Regality, " with Power to judge upon the four Ar- " ticles of the Crown. The ſaid Earl and " his Heirs giving the Service of five Knights " or Soldiers to the King's Army. Dated " at *Airth*, 9th *November*, 1343." This Creation of the Earl of *Wigtoun* I have choſe the rather to mention, becauſe of one notable Circumſtance which demonſtrates the Notion entertained in theſe Days of this Dignity, that it was merely territorial, and went along with the Lands to the Purchaſer, in the ſame Manner that the Dignity of a Baron by Tenure did. Upon the 16th *July*, 1371, a Charter is granted by *Thomas Fleming* Earl of *Wigtoun*, to *Archibald* of *Douglas* Knight of *Galloway*, " Whereby, for the Feuds betwixt " him and the great Men, and Inhabitants of " the Earldom of *Wigtoun*, and for 500 *l.* " *Sterling* paid him, he diſpones to the ſaid " *Archibald* the foreſaid Earldom with the

" Per-

"Pertinents." This Charter was confirmed by *Robert* King of *Scotland*, 8th *February*, 1371. After this Alienation of the Earldom, *Thomas Fleming* was no longer conſidered as an Earl, of which among other Writs the following Charter is full Evidence, granted by *Robert* II. in which "he con-"firms a Charter granted by the ſaid *Ro-"bert Fleeming*, deſigned Laird of *Fullwood*, "to *William Boyd*, of a Wadſet of all the ſaid "*Thomas Fleming*'s Lands within the Baro-"ny of *Lenzie*, for 80 *l. Sterling*." The principal Charter is dated at *Cumbernauld*, 1372, and the Charter of Confirmation at *Kinghorn*, 20th *June*, 1375. Further, that the ſaid *Archibald Douglas* Knight of *Galloway*, did, after the Purchaſe of the Earldom, take upon him the Title of Earl of *Wigtoun*, appears by a Charter of Confirmation ſtill extant, granted by him to *Chriſtian Ramſay*, of the Lands of *Balencreif* and *Gosford*, dated 6th *March* 1422, which runs thus, *Omnibus hanc chartam viſuris vel audituris, Archibaldus de Douglas, Comes de Wigtoun*,

Wigtoun, ac primogenitus filius et heres magnifici et potentis Domini, Domini progenitoris noſtri, Domini Archibaldi Comitis de Douglas, Domini Galwidiæ et vallis Annandiæ, ſalutem, &c.

THERE is little Doubt of the gradual Tranſition, in *Scotland*, as well as in *England*, from the Notion of territorial to that of perſonal Dignity; and the Stiles of our lateſt Patents in *Scotland*, as well as in *England*, are expreſſive of nothing elſe but perſonal Honour.

PROCEED we now to a more particular Examination of the Dignity of Lord Baron. In *England*, three ſorts of Barons are taken Notice of by Writers, Barons by *Tenure*, Barons by *Writ*, and Barons by *Creation*. Barons by Tenure are they who derive their Dignity and Privileges from their Lands, the ſame who are deſcribed above, under the Name of *territorial Barons*. Barons by Writ came to have a Being after the ſmaller

Barons

Barons and Freeholders were exempted from their Attendance in Parliament. The Exemption was granted in *England*, as well as in *Scotland*, with a reſerved Power to the King to require the Attendance of any of them in Parliament, when he ſhould ſee Cauſe. This was done by a ſpecial Writ, directed by the King to the ſmall Baron or Freeholder, whoſe Preſence was required, and who was not otherwiſe bound to attend the Parliament. But as this Writ, whether we conſider the Nature or Tenor of it, was fulfilled by the Perſon's Attendance in that particular Parliament to which he was called, leaving him to enjoy his Privilege of Exemption from other Parliaments, when the Summons was not renewed, it does not readily occur why this Writ ſhould be thought to beſtow any Degree of Nobility, whether perſonal or feudal. And ſuppoſing it did, the Perſon thus ſummoned to Parliament was ſtill a Baron by Tenure; becauſe none could be ſubjected to this Summons, but thoſe who held of the King *in capite*. This Diſtinc-

on therefore is little to be regarded, and accordingly we have no Traces of it in our *Scots* Antiquities.

BARONS by Patent are thoſe who are created by the King, Barons and Lords of Parliament. It is agreed among Authors, that the firſt Inſtance of this Kind upon Record is in the Days of *Richard* II. who in the Year 1387, created *John Beauchamp* of *Holt*, Baron of *Kiderminſter*, and Lord of Parliament. The Patent is in the following Words, *Rex, &c. ſalutem. Sciatis quod pro bono ſervitio quod dilectus et fidelis Miles noſter Joannes de Beauchamp de Holte, Seneſcallus Hoſpitii noſtri, nobis impendit, ipſum Joannem in unum Parium et Baronum Regni noſtri Angliæ præfecimus, volentes quod idem Joannes, et hæredes maſculi de corpore ſuo exeuntes, ſtatum Baronis obtineant, ac Domini de Beauchamp, et Barones de Kiderminſter nuncupentur. In cujus, &c. Dat.* 10. *Octob. &c.*

I HAVE

I HAVE given this Patent at large, that the Nature of the Grant may be the better underſtood; and it merits Attention, becauſe, by creating Earls without Relation to a County, and Barons without Relation to a Barony, Foundation was laid for a great Change in the Conſtitution of Parliament, though the Conſequence was probably not attended to in the Beginning. The Parliament was originally made up of the King's Vaſſals, and the King had no Power to bring any Perſon into Parliament, who did not hold of him in chief. By the Multiplication of Earls beyond the Number of Counties, which was begun upon the Fiction of erecting a Caſtle, or a Mannor into a County, and afterwards carried on without that Form, the Title of *Earl* came to be conſidered as a perſonal Dignity; and now here was another Dignity invented, by creating a Man a Baron and Lord of Parliament; which, tho' it was probably at firſt beſtowed upon Barons by Tenure, came afterwards to be beſtowed upon all Perſons indifferently, without Regard to Land.

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An Earl originally was intitled to ſit in Parliament, as the King's immediate Vaſſal, and a Baron upon the ſame Footing. But now, as the King, by gradually diverging from the original Conſtitution, has acquired by long Uſe, the Privilege of making an Earl without a County, and a Lord of Parliament without a Barony, it may happen ſome time hereafter, that the Houſe of Peers ſhall be filled with Men who have little or no Property in Land. It muſt be acknowledged, that ſeldom has the Peerage been beſtowed but upon Men of opulent Fortunes. But as the Crown is under no Reſtraint in this Particular, we owe it more to the Goodneſs of our Sovereigns, than of our Conſtitution, that the Houſe of Peers is compoſed of Members who, if they are not intirely independent, have themſelves more to blame than their Circumſtances.

Tho' the above Diploma is the oldeſt that is upon Record, it follows not, that it is the firſt of the Kind. The Stile of the Diploma

rather

rather argues an eſtabliſhed Practice, as it is not introduced with any Preamble, importing a new Dignity. At what Time then, by whom, and upon what Occaſion was this new Claſs of Peerage invented, is uncertain. It may appear hard to be conceived at firſt View, what could be the Intendment of it. In the Reign of *Richard* II. and for a long Time before, none but the greater Barons attended the Parliament, the leſſer Barons and Freeholders appearing by their Repreſentatives. Now to what Purpoſe could it be, to create a great Baron, Lord of Parliament, who was intitled already to that Privilege. And if the Honour was deſigned for a leſſer Baron or Freeholder, it was ſufficient to call him to Parliament by a ſpecial Writ. But when the Matter is more attentively conſidered, there will be found probable Reaſons for introducing of this Dignity. The Commerce of Land, begun ſome Centuries before, was greatly increaſed in the 1387. A Barony by Tenure, which was originally a permanent Dignity in a Family, was no longer conſidered as ſuch, after frequent

quent Inſtances of the Tranſmiſſion of theſe Dignities from Hand to Hand, in the Way of Commerce. The Dignity which was conſiderable, while it was confined to certain Families, fell in its Value, after it came to be expoſed to Sale, with the Barony to which it was annexed. This made People aim at ſome external Mark of Honour, which ſhould be permanent in their Families, as Baronies had been of old. And this was effectuated, by creating them and their Heirs Barons, and Lords of Parliament; for here the Dignity and Privilege being beſtowed upon a Family, and not upon Land as formerly, was inherent in the Family, and behoved to ſubſiſt as long as the Family ſubſiſted. Nor did this Invention require any great Stretch of Fancy: For, at this Period, and before, the Notion of perſonal Honours had gained Ground, by the frequent Examples of Earls created, with a very ſlight Relation to Property.

In *Scotland*, where there has been all along a cloſs Imitation of *Engliſh* Cuſtoms, the

the Dignity of Lord of Parliament was early introduced; at what preciſe Period we know not: We are only certain, that this Dignity was poſſeſſed by many Families, before the Reign of our *James* I. The Act ſo often mentioned, exempting the ſmall Barons and Freeholders from Attendance in Parliament, is ſufficient Evidence, ſince it contains a Regulation, "That Biſhops, Abbots, Priors, "Dukes, Earls, LORDS OF PARLIAMENT "and Banrents, be ſummoned to Parliament "by ſpecial Precept." Whether Patents were originally uſed in the Creation of our Lords of Parliament, is not certain. I incline to think they were not uſed, becauſe I have ſeen no ſuch Patent before the Days of *James* VI. Probably there was no other Form uſed but what is contained in the Records of Parliament, bearing, that the King, in full Parliament, created ſuch a Man, and certain Heirs mentioned, Lords of Parliament, and ordained him to be ſtiled *Lord A. B.* of *C. D.* the ordinary Form being to annex *Lord* to the Sirname, with the Addition of the Name

of

of the Eſtate, connected by the Particle *of*; for Example, Lord *Lindſay* of *Byres*, Lord *Stewart* of *Ochiltree*. I muſt further obſerve, that if Lords of Parliament were created among us without a Patent, the Ceremony muſt have been performed in Parliament.

The Barons, by Creation called *Lords of Parliament*, were diſtinguiſhed in common Language from the Barons by Tenure, by being called *Lords*, ſuch as, Lord *Erskine*, Lord *Borthwick*, Lord *Seaton*, &c. whereas Barons by Tenure were called *Lairds*; for Example, the Laird of *Dundas*, the Laird of *Calder*, the Laird of *Luſs*, &c. Becauſe there is no *Latin* Word for a Laird, the Barons by Tenure were called *Domini*, as well as the Lords of Parliament were. But then to expreſs the Difference, the following Forms were conſtantly obſerved. If a Laird, or Baron by Tenure, was meant to be expreſt, it was in this Manner, *Dominus de Calder*, *Dominus de Balwirie*, *Dominus de Luſs*, &c. But Lords of Parliament were expreſt by leaving out the

the Article, thus, *Dominus Erskine, Dominus Seaton, Dominus Borthwick.* For Illuſtration's Sake, I have annex'd a Copy of the Roll of the Parliament 1471, containing, 1*mo*, A Liſt of the Biſhops who appeared in that Parliament; 2*dly*, Of the Abbots; 3*dly*, Of the Earls; 4*thly*, Of the Lords of Parliament; 5*thly*, Of the Barons by Tenure; and *laſtly*, Of the Commiſſioners for the Burrows.

It is certain, that the Lords of Parliament had no greater Power or Privilege in Parliament than the Barons by Tenure had; yet as it was underſtood to be the King's Intention, in creating a Lord of Parliament, to exalt the Perſon honoured to a Rank above that of a Baron by Tenure, the Nation has all along ſubmitted implicitely to the King's Will, as moſt Nations do with Regard to Titles of Honour beſtowed by the Sovereign. And there are two Circumſtances which probably have had an Influence to heighten the Reſpect paid in Conſequence of ſuch Creations. The Attendance of a Baron by Te-

nure in Parliament, is a Service, and not a Matter of Right; whereas, when one is created Lord of Parliament, the Power of attending Parliaments is beſtowed upon him as a Privilege. The other Circumſtance muſt have had ſtill a greater Weight in the Imagination. The Honour of a Baron by Tenure was annex'd to the Land, and went with it to the Purchaſer of the Barony along with the Juriſdiction, and its other Acceſſories. The frequent Tranſmiſſion of Baronies from Hand to Hand, with the Honours annex'd, could not fail to depretiate the Dignity, in the Opinion of all Men. A Man who, after paſſing many Years in an obſcure Rank, purchaſes an Honour with his Money, muſt lay his Account, for ſome time, not to have great Reſpect paid him. And tho' the Reſpect paid to an old Family, will run on a long Time after the Family-Eſtate is gone; yet it muſt dwindle by Degrees, 'till the Family at laſt be loſt in the common Herd. It will be obvious, from theſe Conſiderations, that territorial Honour could not

long

long ſtand its Ground after the Commerce of Land was introduced, and it will be equally obvious, that this Circumſtance behoved to add a great Luſtre to the Dignity of a Lord of Parliament, which was annexed to the Family, and inſeparable from it. Accordingly, after the Lords of Parliament were multiplied by frequent Creations, the Barons by Tenure, who made no Figure in Compariſon, tired of the Expence of attending Parliaments, without any Return either of Profit or Honour, withdrew by Degrees. In latter Times, the Barons by Tenure, who attended Parliaments, were moſtly the eldeſt Sons of the Nobility, infeft in Lands, to intitle them to a Seat there. And in Fact, for forty Years before the 1587, there is not to be found in the Rolls of Parliament, a ſingle Inſtance of a Baron by Tenure attending the Parliament.

It was in this Year 1587, that the Statute of *James* I. of *Scotland* was revived, requiring the leſſer Barons to ſend Commiſſioners to Parliament;

liament; and ſo little Regard was had to Barons by Tenure in this Act, that by an expreſs Clauſe, "All Freeholders of the King, "under the Degree of Prelates and *Lords* "*of Parliament*, are to be warned by Pro-"clamation to be preſent at the chuſing of theſe "Commiſſioners." It was this Act then, which gave the finiſhing Blow to Barons by Tenure, by depriving them of their Seat in Parliament, and thereby reducing them to the Rank of ſmall Barons and Freeholders, who have no other Privilege, but to ſend Repreſentatives to Parliament: And hence a *Scotch* Laird has come to be in ſome Meaſure a Term of Reproach, like a *French* Marquis, or a *German* Baron.

It remains only to be examined, by what Means it happened, that the Commerce of Land, which has quite annihilated the Honour of a Baron by Tenure, had not the ſame Effect with regard to the Dignity of an Earl. It is clear from what is above ſaid, that both of them were once territorial Dignities, and

that

that when the Eſtate was aliened, the Dignity went along with it. We may readily believe, that the Dignity of an Earl was pretty much obſcured, by this Means, as well as that of a Baron; and we have Tradition to confirm us in this Opinion. Yet after perſonal Honour was introduced, whereby we came to ſeparate the Dignity from the Eſtate, the Title of Earl was in greater Repute, while that of Laird, which was the Title of a Baron by Tenure, dwindled away to nothing. When this Matter is conſidered, a ready Solution will occur. The Introduction of that new Claſs of Nobility, called *the Lords of Parliament*, which had the Effect to overſhadow and obſcure the Barons by Tenure, plainly contributed to exalt the Earls. Place and Precedency work ſtrongly upon the Imagination, becauſe they are public and palpable Marks of Reſpect. The Barons by Tenure, ſuch of them who had the greateſt Eſtates, or were moſt remarkable for the Figure they made in the Country, were generally called to be Lords of Parliament; ſome of them were

were more highly exalted, being made Earls. The Body of territorial Barons being thus impoveriſhed, by the frequent Draughts made out of it, came to be little reſpected. They by Degrees withdrew from Parliament, as finding nothing there to anſwer the Expence of Attendance; and they were excluded altogether by the Act 1587, which in theſe Circumſtances could not, at any Rate, be reckoned a Hardſhip, and poſſibly was carried through with their Conſent or Good-liking. The Removal of the Barons by Tenure from the Parliament, behoved to add a Luſtre to the Lords of Parliament, and ſtill a greater Luſtre to the Earls, who took Place of them. And as by this Time, an Earldom was conſidered as a Family Dignity, as well as was a Baronage by Creation, the Earls could not fail to preſerve their ſuperior Rank in the Minds of the People, as well as they did in the Rolls of Parliament.

King

King *Robert's* CHARTER to *Ranulph* Earl of *Murray*.

ROBERTUS, Dei gratia, Rex Scotorum, omnibus probis hominibus totius terræ ſuæ ſalutem. Sciatis nos dediſſe, conceſſiſſe, et hac præſenti carta noſtra confirmaſſe Thomæ Ranulpho militi, dilecto nepoti noſtro, pro homagio et ſervitio ſuo, omnes terras noſtras in Moravia, ſicut fuerunt in manu Domini Alexandri Regis Scotiæ prædeceſſoris noſtri ultimo defuncti, una cum omnibus aliis terris adjacentibus, infra metas et diviſas ſubſcriptas contentis, incipiendo videlicet ad aquam de Spee ſicut cadit in mare, et ſic aſcendendo per eandem aquam, includendo terras de Fouchabre Rothenayks, Rothays et Bocharine per ſuas rectas metas et diviſas, cum ſuis pertinentiis; et ſic aſcendendo per dictam aquam de Spee uſque ad marchias de Badenach, et ſic includendo omnes terras de Badenach et Kyncardyn et de Glençarn cum pertinentiis, per ſuos rectas metas et diviſas; et ſic ſequendo Marchias de Ba-

Bade-

denach uſque ad marchiam de Louchabre, et ſic includendo terras de Louchabre de Maymez de Lezharketh de Glengarech et de Glennelg, cum pertinentiis, per ſuas rectas metas et diviſas; et ſic ſequendo marchiam de Glenelg uſque ad mare verſus occidentem, et ſic per mare uſque ad marchias boreales Ergadiæ quæ eſt Comitis de Ros, et ſic per marchias illas uſque ad marchias Roſſiæ, et ſic per marchias Roſſiæ quouſque perveniatur ad aquam de Forne; et ſic per aquam de Forne quouſque perveniatur ad mare orientale: Tenendas et habendas dicto Thomæ et heredibus ſuis maſculis de corpore ſuo legitimè procreatis ſeu procreandis, de nobis et heredibus noſtris in feodo et hereditate in LIBERO COMITATU, *ac in libera regalitate, cum quatuor querelis ad Coronam noſtram regiam ſpectantibus, et cum omnibus placitis et querelis, tam in communibus indictamentis, quam in brevibus placitabilibus, et cum omnibus aliis loquelis quibuſcunque ad liberam regalitatem pertinentibus, vel aliquo modo pertinere valentibus, adeo liberè, quietè plenariè et honorificè ſicut aliqua terra infra regnum noſtrum in regalitate*

galitate liberius, plenius, quietius aut honorificentius dari poterit aut teneri: una cum magna cuſtuma noſtra burgi de Invernis et coketo ejuſdem, et libertatibus ſuis in omnibus, exceptâ tantummodo parvâ cuſtumâ dicti burgi, cum plenaria poteſtate attaciandi, accuſandi et in omnibus miniſtrandi ac judicandi omnes illos dicti Vicecomitatus injurias, dampna ſeu præjudicia facientes indebitè cuſtumæ prædictæ, adeo liberè in omnibus, ſicut nos vel aliquis miniſtrorum noſtrorum ipſos attachiare, accuſare, miniſtrare ſeu judicare potuimus, ſeu poterit in præmiſſis; et quod dictus Comes et hæredes ſui amerciamenta, excaetas ſeu foriſfacturas inde contingentes adeo liberè et quietè habeant et poſſideant in futurum, ſicut nos ſeu aliquis prædeceſſorum noſtrorum dicta amerciamenta, excaetas ſeu foriſfacturas aliquo tempore habuimus. Quare vicecomiti noſtro de Invernis et ballivis ſuis, ac præpoſitis et ballivis dicti burgi qui pro tempore fuerint, ac ceteris quorum intereſt, firmiter præcipimus et mandamus, quatenus præfato Comiti et heredibus ſuis prædictis ac ſuis miniſtris ſint intendentes

et reſpondentes, conſulentes et auxiliantes, ſuper his, ſi neceſſe fuerit, noſtra regali potentiâ invocatâ, ſine aliquo alio mandato noſtro ſpeciali interveniente. Volumuſque et concedimus quod dictus Thomas et heredes ſui prædicti habeant, teneant et poſſideant dictum Comitatum cum manerio de Elgyn, quod pro capitali manſione Comitatus Moraviæ de cetero teneri volumus et vocari, et cum aliis omnibus maneriis, burgis, villis, thanagiis et omnibus terris noſtris dominicis firmis et exitibus infra prædictas metas contentis, cum advocationibus eccleſiarum, cum feodis et forisfacturis, cum ſilvis et foreſtis, moris et mareſiis, cum viis et ſemitis, cum aquis, ſtagnis, lacubus, vivariis et molendinis, cum piſcationibus tam maris quam aquæ dulcis, cum venationibus, aucupationibus et avium aeriis, cum omnibus aliis libertatibus, commoditatibus, ayſiamentis et juſtis pertinentiis ſuis, in omnibus, et per omnia, tam non nominatis quam nominatis: quibus heredibus dicti Thomæ maſculis deficientibus, quod abſit, volumus quod dictus comitatus ad nos et heredes noſtros liberè

et

et integrè, ac ſine aliqua contradictione revertatur. Volumus etiam et concedimus pro nobis et heredibus noſtris, quòd omnes Barones et Liberè-tenentes dicti Comitatûs, qui de nobis et prædeceſſoribus noſtris in capite tenuerunt, et eorum heredes, dicto Thomæ et heredibus ſuis prædictis, homagia, fidelitates, ſectas curiæ, et omnia alia ſervitia faciant, et baronias et tenementa ſua de ipſo et heredibus ſuis prædictis de cetero teneant: ſalvis tamen Baronibus et Liberè-tenentibus prædictis, ac eorum heredibus, juribus et libertatibus curiarum ſuarum hactenus juſtè uſitatis. Volumus inſuper et concedimus, quòd burgi et burgenſes ſui de Elgyn, de Fores, et de Invirnarne, eaſdem libertates habeant et exerceant quas tempore Domini Alexandri Regis Scotiæ prædicti et noſtro habuerunt; hoc ſolùm ſalvo, quòd de nobis tenebant ſine medio, et nunc de eodem Comite tenent cum eiſdem libertatibus. Salvo etiam nobis et heredibus noſtris in hac donatione noſtra, burgo noſtro de Invirneſs, cum loco, caſtelli et terras ad dictum burgum pertinentibus, cum piſcatione aquæ de Niſs, et cum molen-

molendinis aquæ ejuſdem, cum ſequela dicti burgi et terrarum ad ipſum burgum tantummodo pertinentium: et ſalvis nobis et heredibus noſtris fidelitatibus Epiſcoporum, Abbatum, Priorum et aliorum Prælatorum Eccleſiæ Moravienſis, et advocatione ſeu jure patronatûs eccleſiarum earundem et eorum ſtatu in omnibus quem habuerunt tempore Regis Alexandri prædicti, et aliorum prædeceſſorum noſtrorum Regum Scotiæ: excepto quod homines eorundem citati per nos ad defenſionem regni noſtri intendant vexillo et ſequi teneantur vexillum dicti Thomæ Comitis et heredum ſuorum prædictorum, unà cum aliis qui vexillum Moraviæ ſequi ſolebant antiquitùs: faciendo nobis et heredibus noſtris dictus Thomas et heredes ſui prædicti pro dicto Comitatu, ſervitium octo militum in exercitu noſtro, et Scoticanum ſervitium, et auxilium de ſingulis davacis *debitum et conſuetum, tantummodo, ſine ſecta curiæ ad quamcunque curiam noſtram facienda. In cujus rei teſtimonium preſenti cartæ noſtræ ſigillum noſtrum præcepimus apponi. Teſtibus venerabilibus Patribus Wil-*

lelmo

lelmo Sancti Andreæ, Willelmo Dunkeldenſi, Henrico Aberdinenſi, Dei gratia, Epiſcopis; Bernardo Abbate de Aberbrothock Cancellario noſtro, Malcolmo Comite Levenox, Gilberto de Haya, Roberto de Keth Mareſcallo Scotiæ, Alexandro Margus et Henrico de Sancto claro, militibus.

DIPLOMA of an Earldom, containing the Form of Belting, &c.

JACOBUS, Dei Gratia, Rex Scotorum, omnibus probis hominibus totius terræ ſuæ, clericis et laicis, ſalutem. Cum dilectus noſter conſaguineus Robertus Dominus Seytoun, ex clariſſima. et illuſtriſſima ſtirpe vetuſtâque de Seytoun familia deſcenderit, quæ multis abhinc ſeculis per noſtros felicis memoriæ predeceſſores optimo dominorum merito dignitatem et honorem liberi Baronis et domini parliamenti regni noſtri Scotiæ conſequuta eſt; cumque majores dicti conſanguinei noſtri, in omni officio et fidelitate verſus nos et predeceſſores noſtros

ſtros firmiter permanſerint; Idemque conſanguineus noſter anteceſſorum ſuorum merita non ſolum adequaverit, ſed etiam eximiis ſuis virtutibus ita de nobis meritus ſit, ut regalis noſtri ſtatus ac muneris dignitas et munificentia poſtulent ne patiamur eum et ſucceſſores ſuos meritis honoribus et claritudine deſtitui, ſed potius ut egregie factis honor etiam et claritas accedat; Noveritis igitur nos de conſilio procerum et dicti regni noſtri primatum, exigentibus præmiſſis, creaſſe, ordinaſſe, conſtituiſſe et erexiſſe, tenoreque præſentium creare, ordinare, conſtituere et erigere antedictum conſanguineum noſtrum Robertum Dominum Seytoun, et heredes ſuos maſculos Comites de Wentoun, eidemque Roberto ac heredibus ſuis predictis nomen, ſtatum, gradum, titulum, honorem et dignitatem Comitis de Wentoun in omnibus et ſingulis preeminentiis, dignitatibus, honoribus, et ceteris quibuſcunque ejuſmodi ſtatui Comitis de Wentoun, pertinere ſeu ſpectare valentibus, damus et concedimus. Ipſumque dictum Robertum et heredes ſuos prædictos hujuſmodi ſtatu, gradu, titulo, honore et dignitate

tate Comitis de Wentoun per cincturam gladii, ac unius cappæ honoris et dignitatis, et circuli aurei circa caput poſitionem inſignivimus, inveſtivimus et realiter nobilitavimus. Tenend. et habend. nomen, ſtatum, titulum, gradum, honorem et dignitatem Comitis de Wentoun prædicti, cum omnibus et ſingulis preeminentiis, honoribus, et ejuſmodi ceteris quibuſcunque ſtatui Comitis de Wentoun pertinentibus ſeu ſpectantibus, præfato Roberto Comiti de Wentoun, et heredibus ſuis prædictis, in omnibus et ſingulis parliamentis noſtris, heredum et ſucceſſorum noſtrorum, publiciſque conventionibus et comitiis infra dictum noſtrum regnum Scotiæ tenendis; necnon ut habeant ejuſmodi voces, preeminentias, dignitates, ſtatus, honores, et loca, in omnibus quæ aliquis comes dicti regni noſtri ante hæc tempora melius, honorificentius, et quietius habuit, ſeu uſus et gaviſus fuit, vel in præſenti gaudet et utitur. Et quod dictus Robertus et heredes ſui præfati ſucceſſive vocitentur et nuncupentur Comites de Wentoun perpetuo in futurum, et quilibet eorum vocitetur et nuncupetur; ac ut Comites

mites Parlamenti et regni noſtri antedicti tractentur, teneantur, et reputentur, ac quilibet eorum ſucceſſive tractetur, teneatur, et reputetur. In cujus rei teſtimonium, preſentibus manu noſtra ſuſcriptis magnum ſigillum noſtrum appendi mandavimus. Ex arce noſtra ſancruciana die decimoſexto Novembris, anno Domini milleſimo ſexcenteſimo, coram his teſtibus, prædilectis noſtris conſanguineis et conſiliariis, Joanne Marchione de Hamilton, Comite Arraniæ, Domino Evan, &c. Joanne Comite de Montroiſs, Domino Graham, &c. Cancellario noſtro; Georgio Mariſcalli Comite Domino Keyt, &c. regni noſtri Mariſcallo. Dilectis noſtris familiaribus, Conſiliariis, Domino Jacobo Elphinſton de Barntoun milite, noſtro Secretario; Ricardo Cokburne juniore de Clerkintoun, noſtri ſecreti ſigilli cuſtode, militibus; Magiſtro Joanne Skene noſtrorum rotulorum, regiſtri ac conſilii, clerico; Domino Joanne Cokburne de Ormeſtoun milite, noſtræ juſticiariæ clerico; Magiſtro Willelmo Scot de Elie, noſtræ Cancellariæ Directore.

JACOBUS R.

DI-

DIPLOMA of an Earldom of a later Date, without any of the above Forms.

ANNA, Dei gratia, Magnæ Britanniæ, Franciæ et Hiberniæ, Regina, fideique defenſor; omnibus probis hominibus ad quos præſentes literæ noſtræ pervenerint, ſalutem. Quandoquidem nos regio noſtro animo perpendentes nos, noſtrosque regios anteceſſores perplurima fidelia ſervitia à nobili et antiqua familia de Argyle accepiſſe, toties agnota in diplomatibus aliiſque magni momenti commiſſionibus et muneribus plurimis hac præclara familia ortis, conceſſa, et quæ non minus ſibiipſis honorem, et patriæ commodum tribuendo, quam nobis noſtriſque Regiis anteceſſoribus approbantibus, geſta fuere; benignè ſtatuimus non ſolum ſervitiorum quæ hactenus egregiè præſtiterunt, memoriam retinere, ſed etiam eos ulterius excitare et animare, hæc facta proſequi et repetere, quæ nobis nunc placet remunerare, durabilem et inſignem regii noſtri favoris characterem conferendo, in fideliſſimum noſtrum Conciliarium Dominum Archibaldum

Campbell, fratrem germanum Joannis Ducis de Argyll, ejuſque heredes poſtea expreſſos, qui muneribus ſibi hactenus commiſſis fideliter et diligenter functus eſt: Noveritis igitur nos, tanquam ſolus author et ſeaturigo honoris, feciſſe, conſtituiſſe et creaſſe, ſicuti nos per has noſtras patentes literas facimus, conſtituimus et creamus, dictum Dominum Archibaldum Campbell, Comitem, Vicecomitem, et liberum Parliamenti Dominum, intitulandum et deſignandum Comitem et Vicecomitem de Iſlay, et Dominum Oranſay, Dunoon et Arroſe, omni tempore futuro. Dando, concedendo et conferendo dicto Domino Archibaldo Campbell, et heredibus maſculis ex ſuo corpore procreandis, titulum, honorem, ordinem, gradum et dignitatem Comitis, Vicecomitis, et liberi Parliamenti Domini, ut dictum eſt; cum plenaria admodum poteſtate et authoritate illi ejuſque antedictis, eundem cum omnibus et ſingulis prærogativis, præcedentiis, præeminentiis, et privilegiis eo ſpectantibus poſſidere et frui, quibuſcum nos eundem Dominum Archibaldum Campbell ejuſque antedictos nobilitamus et inveſtimus,

ſpe-

ſpeciatim vero cum libero ſuffragio in parliamento. Tenend. dictum honorem, ordinem, dignitatem, et gradum Comitis, Vicecomitis, et liberi Parliamenti Domini, cum omnibus prærogativis, præeminentiis, et privilegiis eo ſpectantibus, per eundem Dominum Archibaldum Campbell ejuſque antedictos, de nobis noſtriſque Regiis ſucceſſoribus in omnibus parliamentis, ordinum conventibus, generalibus conſiliis, aliiſque congreſſibus quibuſcunque, publicis ſeu privatis, in dicto regno noſtro tam plenariè adeoque liberè in omnibus reſpectibus quam quivis alius Comes, Vicecomes, et liber Parliamenti Dominus ſimili titulo, honore et dignitate, cum univerſis privilegiis aliisque ei ſpectantibus uſus et gaviſus eſt, ſeu quovis tempore præterito, preſenti vel futuro uti et gaudere poterit. Leoni porro armorum Regi ejuſque fratribus fœcialibus imperamus, ut præfato Domino Archibaldo Campbell, nunc Comiti de Iſlay, talia prioribus inſigniis ejus gentilitiis additamenta, qualia hac occaſione expediens et conveniens videbitur, dent et præſcribant. Et declaramus et ordinamus haſce noſtras patentes

literas,

literas, magno noſtro ſigillo munitas, adeo validas et efficaces fore dicto Domino Archibaldo Campbell, ejuſque antedictis, pro poſſidendo prædicto titulo, honore et dignitate, ac ſi cum omnibus ritibus et ſolemnitatibus, ſimilibus occaſionibus per prius uſitatis, ille ejuſque inveſtiti et inaugurati eſſent; quocira diſpenſavimus perque præſentes in perpetuum diſpenſamus. In cujus rei teſtimonium, præſentibus magnum ſigillum noſtrum appendi mandavimus. Apud aulam noſtram de Kenſingtoun, decimo nono die menſis Octobris, anno Domini milleſimo ſeptingenteſimo ſexto, et anno regni noſtri quinto.

Per ſignaturam manu S. D. N. Reginæ, ſupraſcriptæ.

DIPLOMA of a Lord of Parliament.

CAROLUS, Dei gratia, Magnæ Britanniæ, Franciæ et Hiberniæ, Rex, fideique defenſor; omnibus probis hominibus ſuis ad quos præſentes literæ pervenerint, ſalutem. Sciatis, quia nos conſiderantes dilectum noſtrum

Dominum

Dominum Jacobum Sandilands de St. Monance, militem, ejuſque predeceſſores præclaros et illuſtres viros ac probos et fideles ſubditos illuſtriſſimis noſtris progenitoribus eſſe et fuiſſe, et multa preclara obſequia et ſervitia nobis et noſtris præclariſſimis predeceſſoribus Regibus Scotiæ eternæ memoriæ in eorum emolumentum ac reipublicæ dicti regni noſtri incrementum omnibus temporibus retroactis, tam tempore pacis quam belli, præſtitiſſe. Et nos e regia noſtra et gratioſa beneficentia volentes animum addi dicto Domino Jacobo Sandilands ad inſiſtendum veſtigiis illuſtrorum ejus prædeceſſorum, quoad ſervitia et obſequia nobis et poſteris noſtris præſtanda, conferendo in eum titulum, dignitatem et ordinem ſubſcriptam, tanquam ſpecialem teſſeram regii noſtri favoris, cum dictus Dominus Jacobus ex antiqua et ſplendida familia de St. Monance oriundus ſit, cui pro præſente luculentæ opes ſuppetunt ad obeundum et fovendum ordinem et gradum Domini, infra dictum regnum noſtrum omni tempore futuro. Igitur pro diverſis aliis magnis reſpectibus, cauſis et rationibus, nos moventibus

ventibus, ex authoritate noſtra regali et poteſtate regia dedimus, conceſſimus, et diſpoſuimus, tenoreque præſentium damus, concedimus, et diſponimus memorato Domino Jacobo Sandilands, ejuſque hæredibus maſculis ex corpore ſuo legittimè procreatis, ſeu procreandis, titulum, ſtilum, gradum, locum, honorem, dignitatem, et nobilitatis ordinem, Domini; ac damus, concedimus, volumus, decernimus et ordinamus, quod ille ejuſque hæredes et ſucceſſores prædicti indigitabuntur, deſignabuntur, vocitabuntur et nominabuntur Domini de Abercrombie, *omni tempore futuro, cum loco et ſuffragio in omnibus publicis et privatis conventibus, parliamentis, ſimiliter adeoque liberè in omnibus reſpectibus ſicut quicunque alius liber Dominus aut Baro Parliamenti infra dictum regnum noſtrum; una cum omnibus privilegiis, dignitatibus et immunitatibus quibuſcunque ad ſimilem locum ſpectan. et pertinen. Cum poteſtate memorato Domino Jacobo, ejuſque hæredibus maſculis antedictis, gaudendi et fruendi dicto ſtilo, loco, ordine, honore et dignitate Domini, omni tempore futuro; cum omnibus præce-*

præcedentiis, præeminentiis, privilegiis, immunitatibus, aliisque commoditatibus, eo competentibus, in omnibus noſtris et ſucceſſorum noſtrorum parliamentis, conventibus, conſiliis, aliisque locis, vel actionibus quibuſcunque, privatis ſeu publicis, ac utendi, gaudendi, et fruendi jure ſuffragii, prærogativæ, gradus et loci, ac ſtatus Domini et Baronis in omnibus, ſicut quicunque alius ejuſdem ſtatûs gaviſus eſt et poſſedit, aut de præſenti poſſedit et gaudet; quodque dictus Dominus Jacobus, ejuſque hæredes maſculi, et eorum ſinguli, ſucceſſivè deſignentur et indigitantur Domini de Abercrombie perpetuo; utque ſic reputentur, habeantur et agnoſcantur, ac omni honore et reverentia Dominis Parliamenti competentibus afficiantur. In cujus rei teſtimonium, præſentibus, magnum ſigillum noſtrum apponi præcepimus, apud Carisbrook, duodecimo die menſis Decembris, anno Domini milleſimo ſexcenteſimo quadrageſimo ſeptimo, et anno regni noſtri vigeſimo tertio.

ROLL of the Parliament 1471.

Die vero xviiii Februarii.

Præſente dicto Supremo Domino noſtro REGE, *una cum Epiſcopis, Abbatibus, Prioribus, necnon Nobilibus, Ducibus, Comitibus, Dominis, Baronibus, Libere-tenentibus ac Burgorum Commiſſariis ſubſcriptis, viz.*

Alexandro Duce Albaniæ, &c.

EPISCOPIS

Dunkelden,
Aberdonen,
Roſſen,
Orchadeny.

PRIORIBUS

Portmowok,
Roſtinot,
Coldinghame,
Mae.

ABBATIBUS

Aberbrothoc,
Melroſs,
Haliruidhouſe,
Paſleto,
Scona,
Driburgh.

COMITIBUS

Cancellarius,
Errol,
Merſhell,
Huntle,
Crawfurd.

COM-

COMITIBUS

Mortoun,
Ergile,
Rothes,

DOMINIS

Innermeth,
Erskin,
Haliburton,
Setoun,
Borthwic,
Dernle,
Lindissay,
Gray,
Forbes,
Kilmawrs,
Kennedy,
Hamiltoun,
Monypenny,
Saltoun.

BARONIBUS

Sanquhar,
Bewfort,
Haltoun,
Craigmiller,
Lestalrig,
Dundas,
Bargany,
Bass,
Caldor,
Luss,
Tariglis,
Elzetstoun,
Ruthven,
Sauquhy,
Elphinstoun,
Guthrie,
Torthorwald,
Corstorphin,
Edmunstoun,
Dalwolsy,
Bothiok,
Petarrow,
Abyrcrumby,
Erolet,
Rusky,

BARONIBUS

Carns,
Cranſton,
Halkerſtoun,
Boyle,
Ker,
Gask,
Dron,
Hume,
Balcolmy.

COMMISSARIIS

Edinburgh, { *Zong,* *Boncle,*
Aberdeen, - *Knows,*
Stirl. Walter Stewart,
Linlichqw, { *Fowlis,* *Forreſt,*
Haddingtoun, Girnlaw,
Dumfries, - *Welch,*
Are, - - *Multrar,*
Dundee, { *Monorgund* and *Mal. Guthre.*

ESSAY

ESSAY IV.

Upon SUCCESSION *or* DESCENT.

INTRODUCTION.

SUCCESSION, or the Tranſmiſſion of Eſtates from the Dead to the Living, is a Subject which makes a great Figure in Hiſtory, as well as in Law. It is a Subject full of Curioſity; for, depending moſtly upon remote Principles of the Imagination, it ſhows, in a Multitude of Inſtances, how much we are governed by Feelings, which, abſtractly conſidered, appear to be of the weakeſt Sort. One Effect of this indeed is, that there is no ſuch Thing as univerſal Rules of Succeſſion. Different Maxims are not only embraced in different Countries, but have been eſtabliſhed in the ſame Country at different Periods: So that Succeſſion, like the Faſhion, has hitherto been in a conſtant Fluctuation. We are apt to think, that the Rules are now ultimately ſettled without Fear of Change. But ſo, in all Probability, did our Fore-fathers, three or four Centuries ago;

ago; for 'tis a common Miſtake, from any ſhort Specimen, to infer a conſtant Uniformity. However this be, 'tis of great Uſe to trace the Rules of Succeſſion through their different Changes. A Lawyer poſſibly may think his Stock of Knowledge ſufficient, if he can point out the Rules which obtain at preſent in his own Country. But a Man who knows no more of the Matter, cannot form any clear Judgment about many old Tranſactions of the greateſt Importance. In the Hiſtory of *England*, of *France*, of *Scotland*, and indeed of moſt *European* Nations, we meet with frequent Diſputes about the Succeſſion of Kingdoms, and of other Sovereignties, which we are altogther at a Loſs to comprehend, becauſe ſuch Diſputes cannot exiſt at this Day. Who imagines that a ſecond Son or Daughter can have any Pretenſions to a Crown, ſo long as there are Iſſue exiſting of the eldeſt: Yet this very Thing was made a Queſtion of in the famous Trial about the Crown of *Scotland* betwixt *Bruce* and *Baliol*. We are apt to imagine, that a ſe-

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cond Son, who puts in ſo idle a Claim, has other Arguments to ſupport himſelf with, than what are founded in the Laws of his Country: not conſidering that the Right of Repreſentation, tho' now generally eſtabliſhed, was but creeping into Practice in thoſe Days. In former Ages the Right of Repreſentation was not ſo much as dreamed of; Witneſs *Lewis*, the ſecond Son of *Charlemain*, called to the Succeſſion of the Crown of *France*, when there was an elder Brother's Son exiſting. Inſtances of this Nature, and there are Multitudes of them, make it evident, how neceſſary a Qualification it is in a Hiſtorian to be acquainted with the Laws and Antiquities of the Country he writes of. Is it not ſurpriſing, that Father *Daniel*, in his Hiſtory of *France*, gives the above Account of the Succeſſion of *Charlemain*, without making the leaſt Reflection upon it, as if it were an ordinary Event, which needed no Comment? So dry an Hiſtorian cannot fail to perplex his Readers. Perhaps the Father was himſelf perplexed, and choſe to hide his Ignorance by his

his Silence. *Rapin* is a moſt judicious Hiſtorian, but he is frequently at a Loſs, thro' want of a ſufficient Knowledge of the Conſtitution of *England*. His Book contains many Inſtances of diſputed Succeſſions, where the Facts are ſtated with great Accuracy. But an intelligent Reader will perceive, that he is almoſt always at a Loſs when he endeavours to ſet forth the Merits of the Cauſe, which muſt be the Caſe with an Author who is not intimately acquainted with the Notions of Succeſſion entertained in the Age, and in the Country he writes of. The following Account of the Matter is therefore given with a View to anſwer the Purpoſes of Hiſtory as well as of Law.

PART

PART I.

AFTER Property was introduced, and had gained a firm Eſtabliſhment, the Matter of Succeſſion could not be long neglected. The Death of the very firſt Man who acquired Property, muſt have given Occaſion to the Queſtion, who was to ſucceed him? If his Will was declared upon the Point, no Doubt could be that it was the Rule (*a*). If the

(*a*) The Author is aware, that while Property was in its Infancy, it was doubted whether a Man's Will, in whatever Manner declared, could have the Effect to regulate his Succeſſion. But when the Thing is attended to, it will be found to reſolve into a Diſpute about the Nature of Property. Occupation is allowed to have been the firſt Foundation of Property in Land. When a Piece of Ground was taken out of the Common, and cultivated by the Occupier for the Uſe of himſelf and Family, it ſoon came to be ſettled, that this Perſon was to have the undiſturbed Poſſeſſion for his Life; otherways farewell to Labour and Induſtry. But as his Intereſt in the Subject behoved to die with himſelf, it was not readily conceived how his Power over the Subject ſhould continue after his Intereſt was at an End, or at any Rate ſubſiſt after he was dead and gone. But this Difficulty was plainly owing to the limited Notion of Property, which was entertained after its firſt Introduction. In early Times Property was not much diſtinguiſhed from what is now called *uſufruct*. No more was conceived in Property, but

the Eſtate was left *in medio*, without a Will to direct the Succeſſion, his Children for whom he was bound to provide, would naturally be ſuggeſted to the Mind. This pointed out the primary Rule of Succeſſion, that Children ſucceed *ab inteſtato*. But what if there are no Children? 'Tis but following out the ſame Rule, to pitch upon the neareſt Relation. For after a Man's Death, his Children or

but the unlimited Uſe of the Subject. But Experience pointed out a more extenſive Idea of Property. Mankind are fond of Power, eſpecially over what is their own; and it came to be conſidered as an unreaſonable Hardſhip, after Induſtry beſtowed in acquiring and improving a Field, that the Occupier ſhould not have it in his Power to diſpoſe of it at his Pleaſure. The Power of Diſpoſal was reliſhed, and became Law, becauſe it was every one's Intereſt that it ſhould be Law. And when once this Power was underſtood, it came by Degrees to be extended the utmoſt Length it was capable of. Thus *Grotius*, *Lib.* 2. *Cap.* 6. *Sect.* 14. *Poſſum enim rem meam alienare non pure modo ſed et ſub conditione; nec tantum irrevocabiliter, ſed et revocabiliter, atque etiam retenta interim poſſeſſione et pleniſſimo fruendi jure. Alienatio autem in mortis eventum, ante eam revocabilis, retento interim jure poſſidendi ac fruendi, eſt teſtamentum.* Therefore, when we read of ancient Laws among particular Nations, introducing the Power of making a Teſtament, we muſt not conſider theſe Laws as beſtowing peculiar Privileges, but only as authoriſing a Practice which was the Conſequence of an enlarged Idea of Property.

or other Relations, will be conſidered as having a cloſer Connection with his Effects than Strangers; and, by a natural Tranſition of Ideas, the Property, that was in the Deceaſed, will be readily transferred to his Kindred.

CHILDREN, as having the cloſeſt Connection, come to be conſidered in the firſt Place, and here a ſubtile Queſtion occurs, Whether, by the Law of Nature, Daughters are intitled to ſucceed equally with Sons? One Thing is clear, that wherever the Notions of a Family have got firm Footing, Female Succeſſion muſt be excluded, ſince a Woman by Marriage making a Part of her Husband's Family, cannot readily carry on the Idea of that of her Father. But the Notions of a Family are the Conſequence of Male Succeſſion, and are not ſuggeſted by any natural Principle. If we lay aſide the Notions of a Family, Propinquity muſt alſo be laid aſide, which throws an equal Weight into either Scale. What readily occurs after this, to determine the Queſtion, is, that Women ſtand in Need

of Food and Raiment as well as Men do, and are equally capable of enjoying Riches. It is true, that the Male has among all Nations, and at all Times, been eſteemed the *dignior perſona*. But this Conſideration can never be of Weight to thruſt out Females altogether, and once admitting them into a Share, they muſt have an equal Share, as there are no poſſible *Data* in this Caſe to fix any other Proportion.

ACCORDINGLY we find this Rule obſerved among all Nations, with regard to Succeſſion in Moveables. In moſt Countries Females have been excluded from ſucceeding to Lands. But this was the Effect of diſtingiſhing Mankind into Tribes and Families, which, tho' not original in Nature, crept pretty early in. It was evidently ſo among the *Jews*, and among the *Romans*, where the Diſtinction betwixt Tribes and Families was ſo remarkably preſerved, that by Law a Perſon of one Tribe could not ſucceed to one of another. And in other Countries where theſe Diſtinctions were

were not ſo much attended to, War in early Times being the principal Occupation, and Land the principal Object of Conqueſt, it was natural that Males only ſhould have the Poſſeſſion of Land, which they only could defend. But even in this Caſe, it muſt be obſerved, that the whole Sons ſucceeded equally, which was departing as little from the Law of Nature, as the Circumſtances of the Caſe would allow.

The Right of Primogeniture was a Creature of the Feudal Law. The Poſſeſſion, not the Property of Land, was given for perſonal Service; and when it came to be the Practice to extend ſuch Grants in favours of Children, the Maſter or Superior having no Claim but to one Man's Service, the eldeſt Son came readily into the Father's Place. For as in tracing out a Family, the Mind deſcends by Degrees from the Father, firſt to the eldeſt Son, and ſo downwards in the Order of Age; the eldeſt Son, where but one can take, is the firſt who preſents himſelf. And as the

Feudal

Feudal Law gained Ground, and ſpread itſelf over all *Europe*, the Right of Primogeniture came by Degrees to be a general Rule in the Succeſſion to Land Eſtates, which were held by military Service.

As this was evidently the Reaſon for preferring the eldeſt Son in a military Feu, the ſame Reaſon, in my Apprehenſion, behoved to take Place in Burgage Lands, which being given for the Service of Watching and Warding, if one only was bound to perform the Service, the eldeſt Son was the Perſon. But Soccage Tenure ſtood upon a different Footing. Where the Poſſeſſion of Lands is given to a Man, not for perſonal Service, but upon Condition of delivering to the Maſter yearly a certain Quantity of Corn, or of other Fruits, which are the Produce of the Ground, there appears no good Reaſon why the Benefit of ſuch a Contract, if there is any Benefit from it, ſhould not accreſce to all the Family equally. And yet, ſo far as we can diſcover, Sons were always preferred to Daughters in the

the Succeſſion of Soccage Lands. All I have to ſuggeſt is, That in Times of Ignorance and Barbarity, when Strength of Body and perſonal Courage are the only Virtues, Women are little regarded. And the Practice of debarring them altogether from Succeſſion to military Feus, which made the Bulk of the Property of the Nation, did probably pave the Way for preferring the Males to the Succeſſion of other Eſtates. This Conjecture appears natural enough; but it is more difficult to be explained, by what Means it has happened, that the equal Succeſſion of Males in the Soccage Tenure has gone quite into Deſuetude, and given Place to the Right of Primogeniture. This Revolution is not taken Notice of by our Hiſtorians, nor accounted for by our Lawyers. One Thing is certain, that Equality among Males, in the Deſcent of Soccage Lands, was in Vigour ſo late as the *Regiam Majeſtatem*. See *R. M. L.* 2. *C.* 27. We muſt venture another Conjecture here. After the Days of *David* II. during whoſe Reign the *Regiam Majeſtatem* was compoſed,

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peaceable Times brought on new Manners. Riches came to be in greater Requeſt than military Proweſs, and many Superiors were willing to take Rent in Place of Service. This, in ſome Meaſure, confounded the Diſtinction betwixt Military and Soccage Tenures, ſo as by Degrees to make one Rule ſerve for the Succeſſion in both. And as Military Feus were by far the moſt frequent, the Right of Primogeniture, which took Place in moſt Caſes, became at laſt univerſal.

But we are not yet at an End with the Difficulties which ariſe from this Branch of our Subject. Tho' the Succeſſion to Soccage Lands came after this Manner to be confined to the eldeſt Son; yet no Alteration was made in the Female Succeſſion; Females continued to ſucceed all equally, and do ſo at this Day. This at firſt Sight muſt appear whimſical, and not readily to be accounted for. If the Right of Primogeniture was ſo univerſal a Principle, how came it to ſtop ſhort, and not to obtain in every Caſe? And 'tis evident, where there

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are Daughters only, that the Mind, in tracing out the Line, deſcends to the eldeſt, as naturally as to the eldeſt Son, where there are Male Iſſue. Among the many Grounds of falſe Reaſoning, there is not one more common, than from ſome ſlight or accidental Relation to form an Analogy betwixt two Things that are very different in other Reſpects. The bad Effect of which is, that the Mind, intent to compleat the Analogy, has a Tendency to equiparate them in every Circumſtance. 'Tis probable, that the Soccage Tenure was not far behind the Military Tenure in Point of Time; and if ſo, the Rules of its Succeſſion were ſettled before the Right of Primogeniture came to take ſuch faſt hold of the Mind, as to be reckoned a Sort of natural Principle. Accordingly we find, that tho' Males were preferred, yet in other Reſpects the Law of Nature took Place, by calling the Males all equally; and failing them, the Females. But this Circumſtance we muſt attend to, that tho', in Progreſs of Time the Right of Primogeniture came to be eſtabliſhed as a general Law,

Law, and in ſome Sort as a natural Principle; yet there was no Example of this Right taking Place, except among Males. It was this very Conſideration, in all Appearance, which led our Forefathers, in their ſuperficial Reaſonings, to lean to the Right of Primogeniture in all Caſes of Male Succeſſion, without thinking of encroaching upon the eſtabliſhed Rules of Female Succeſſion. Not at all attentive to what is fundamental in this Matter, in the *firſt* Place, that the Right of Primogeniture depended upon the Nature of the Military Holding, which therefore could not with any Shew of Reaſon be extended to Holdings of a different Kind; And, in the *ſecond* Place, That if the Privilege of Primogeniture was to be the ſole Rule, it ought to have Place in the Succeſſion of Females, as well as of Males.

After the Feudal Law came to a Standard, the Succeſſion in Military Feus was regularly extended to the Male Deſcendents of the original Vaſſal, and after theſe were all ex-

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exhauſted, the Fee returned to the Superior. There was no Place for collateral Succeſſion. It might happen, that Collaterals to the deceaſed Vaſſal did ſucceed, but it was not *qua* Collaterals, but *qua* Heirs-male of the Body of the original Vaſſal. See *L. feud. T.* 11.

In handling a Subject, where we have ſo few Principles to direct us, and where theſe Principles are not of the firmeſt Sort, 'tis no Wonder that Difficulties crowd in on every Side. So far we have proceeded upon a reaſonable Foundation, that in the Succeſſion of Military Feus, Preference is given to the eldeſt Son. But now the Queſtion is, Whether this Privilege is to be extended to his Male Iſſue? A Military Vaſſal dies leaving Iſſue a younger Son, and a Grandſon by his eldeſt Son, the Doubt is, Whether the Son or Grandſon is Heir: The Son is undoubtedly the neareſt in Blood, and therefore, by the Law of Nature, ought to be preferred; and accordingly this appears to have been the Law in the Days of *Charlemain*, whoſe ſecond Son

Lewis was called to the Succeſſion as lawful Heir, tho' *Charlemain* had by his eldeſt Son a Grandſon of perfect Age, when the Succeſſion opened. On the other hand, the Circumſtances of the Grandſon are to be conſidered. He is born, and perhaps educated, with the Proſpect of ſucceeding to the Eſtate, after the Death firſt of his Grandfather, and then of his Father. It cannot but be conſidered as a Hardſhip to be deprived at once of all his Hopes, by the unexpected Accident of his Father's Death before that of his Grandfather. Such are the Circumſtances which weigh againſt one another; and therefore no Wonder to find the moſt ſenſible Writers taking different Sides in a Queſtion ſo dubious. Perhaps there is not one Queſtion in Law, which has afforded a greater Field, not only for Law-ſuits, but for bloody and cruel Wars. The Hiſtorians of *France* and *England* are full of Inſtances of this Kind. And the celebrated Struggle about the Crown of *Scotland*, betwixt *Bruce* and *Baliol*, had no other Foundation. *Baliol* was deſcended of the eldeſt Siſter,

Siſter, *Bruce* only of the ſecond. But then it was urged in Behalf of the latter, that he was one Degree nearer to the common Stock than his Competitor, and conſequently nearer in Blood. This Matter is now ſettled, and has been for Ages in favours of the Deſcendents of the eldeſt. But it was in ſome Meaſure reckoned a doubtful Caſe, even ſo late as the Time when the *Regiam Majeſtatem* was compoſed, as will appear from the 33 Chapter of the ſecond Book.

It has been diſputed, whether the ſame Rule ought to hold in the Succeſſion of Collaterals. The Ground of the Doubt is, That as a Man is never without Hopes of Iſſue, none of his Collaterals can be born or educated with the Hopes of ſucceeding to him. This Circumſtance being removed, which preponderates in the former Caſe, it may be thought, that there is nothing to weigh againſt the Right of the neareſt Agnat. Upon this Ground it was, that after the Death of *Henry* III. of *France*, the League ſet up the

up the Cardinal of *Bourbon* as Heir of the Crown, againſt his Nephew the King of *Navarre*, afterwards *Henry* IV. For tho' *Henry* was the Son of the elder Brother, yet the Cardinal the younger Brother was one Step nearer to the common Stock. It is extreme probable, had Caſes of this Nature firſt occurred, that the neareſt Agnat would have been preferred; and it is equally probable, had this once been eſtabliſhed as the Rule, tho' occurring only in collateral Succeſſion, that it would have been applied to the Caſe of Deſcendents, without Regard to their Hope of Succeſſion. But Inſtances firſt occurring, as readily would happen in the Caſe of Deſcendents, the Deciſions given in favours of the eldeſt Son's Deſcendents, eſtabliſhed a Sort of general Rule, which was afterwards applied to the Caſe of Collaterals.

THUS we ſee after what Manner the Rules of Succeſſion have been eſtabliſhed, not only from very ſlender Circumſtances, but in ſome Meaſure from Accident. Had the above

Queſtion

Queſtion firſt occurred in collateral Succeſſion, probably we ſhould never have heard of this Privilege given to Deſcendents, which Lawyers call the Right of Repreſentation. But as this Privilege has been firſt eſtabliſhed in favours of Deſcendents, it has been conſidered as a general Rule, and applied to the Caſe of Collaterals, tho' without the ſame Foundation. But this will not be thought ſtrange, when it is conſidered, how ſtrong a Propenſity there is in our Nature to act by general Rules, without regard to the Variation of Circumſtances.

And here we are furniſhed with an Opportunity to conſider a peculiar Sort of Argument, the great Reſource of Lawyers, when they are preſſed with Difficulties upon any Subject. Caſes often happen where a general Rule will not apply, and where it is neceſſary to make a particular Rule to govern ſuch Caſes. But as Mankind are addicted to general Rules, and as the Indolence of Lawyers makes it a Task too hard for them

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to trace out all the Rules which govern particular Caſes, they have invented an eaſy Method to bring all the Exceptions under the general Rule; which is by ſuppoſing the Fact to have happened otherways than it did. And this they juſtly term a *fictio juris*. Thus for Example, in the *Roman* Law, a Citizen who was taken Captive by the Enemy, loſt the *jus civitatis*, and all the Privileges attending it. This was a general Rule eſtabliſhed among them. But ſuppoſing the Captive to have made his Eſcape, or to have recovered his Liberty by ſome other lucky Accident, it would have been an Hardſhip intollerable, that this Man without a Fault ſhould be forfeited of all his Rights and Privileges. The Rule, 'tis evident, could not be extended to this Caſe. But what was to be done; for Lawyers were loath to quit with the general Rule? Inſtead of making a Rule for Caſes of this Nature, they extricated themſelves out of the Difficulty, by ſuppoſing forſooth, that this Man had never been out of the City; and this is called the *jus poſtliminii*. The *Roman*

Law

Law is full of ſuch Fictions, and the Moderns their humble Imitators, have followed them but too cloſs. Thus, upon the Subject under Conſideration, it is juſtly eſtabliſhed as a general Rule, that the next in Blood ſucceeds. The Privilege which is given to the Deſcendents of the next in Blood, who dies before the Succeſſion opens to him, is obviouſly an Exception from this general Rule. But to ſupply this Defect in the Rule, the Deſcendent is ſuppoſed by a Fiction of Law, to come in Place of the Deceaſed, to be as it were the ſame Perſon with him, and intitled to claim the Succeſſion, as he could have done had he been alive. Let us hear our Countryman *Craig* upon this Fiction. *Jus repræſentationis eſt, quoties poſterior non ex ſua, ſed ex prioris perſona, quam repræſentat, jus ſucceſſionis petit, veluti præmortuo filio cum nepos aut neptis ad ſucceſſionem vocantur; non enim ratione ſui, ſed patris eorum, i. e. filii defuncti, Succeſſio ad eos pertinet, neque hi ex ſua perſona hæreditatem aut ejus partem poſſunt petere, ſed tantum ex perſona patris (nam ex*

ſua

ſua non admitterentur, cum filii ex eodem parente ſuperſint, qui horum ſunt patrui, et ſic agnati propiores defuncti;) et hoc eſt ejus perſonam repreſentare. This, as has been obſerved, is a very commodious Method of ſolving Difficulties. But however commodious, I will venture to ſay, it affords little Satisfaction to the Mind. For the Queſtion ſtill recurs, Where is the Foundation for this Fiction? Why ſhould there be a Right of Repreſentation in Lands more than in Movables? To ſay no worſe of it, it ſeems, in my Apprehenſion, to ſignify nothing but to darken inſtead of clearing the Subject Matter. Is it not more natural, and almoſt as eaſy to ſet forth in plain Terms the Hardſhip it would be upon the eldeſt Son's Deſcendents, to be cut out of their Hopes of Succeſſion by the premature Death of their Father; and that this Conſideration in ſuch Caſes prevails over the Right of Propinquity.

It remains only to be obſerved upon this Head, that, purſuant to the above Plan of Suc-

Succeſſion, three general Rules behoved to be eſtabliſhed with regard to military Feus. 1*mo*, That the eldeſt Male is the Favourite of the Law, and preferred to the Succeſſion. 2*do*, That the Eſtate gradually deſcends from the elder Brother failing Iſſue, to the younger Brothers. And 3*tio*, That it deſcends to every one of the Male Iſſue of the elder Brother, before it comes, to the younger Brother or his Iſſue.

Tho' ſuch was the common Courſe of Succeſſion in military Feus, which in Time came to be looked on as Part of the common Law of the Land, we need not doubt that it was often broke in upon by ſpecial Appointment. In ſtrict Law the Vaſſal's Right is but an *Uſufruct*, and it was late before he was conſidered as Proprietor. The Superior therefore behoved to have a great Sway in chuſing an Heir for his Vaſſal; eſpecially in early Times, before Feus were regularly extended to Heirs. That Son, without Regard to Seniority, who had ſhown himſelf

moſt active in War, would often be preferred. And even in after Times, when Succeſſion in Feus was more firmly eſtabliſhed, Examples could not be wanting of ſetting aſide the eldeſt Son, becauſe of Defects in Body or Mind; or perhaps becauſe he was intended for the Church, or addicted to the Arts of Peace. This gave a Beginning to Entails, by altering the Order of Succeſſion, and preferring a younger Son and his Male Deſcendents to the elder Sons and their Deſcendents.

But, now ſuppoſing that a younger Son, thus pitched upon to ſerve the Superior in Place of his Father, dies without Male Iſſue, the Queſtion is, who is his Heir in the Feu, his elder Brother or his younger. Perhaps there will not be found in Law a Speculation more curious than what this Doubt gives Riſe to. Let us examine attentively what Things occur upon this Subject. As 'tis probable from the Circumſtances of the Times, that Examples of ſuch Entails were frequent, even in the Infancy of the feudal Law, we cannot well

well ſuppoſe, that the Rules above laid down, touching the Succeſſion to military Feus, were very firmly eſtabliſhed, when there was firſt Occaſion to determine the Point under Conſideration. But ſuppoſing theſe Rules to be firmly eſtabliſhed, it muſt have been obvious, at firſt View, that they did not apply to this Caſe. The Right of Primogeniture and the gradual Deſcent, relate only to the Father's Succeſſion, and go no further than to aſcertain, that where a Man dies *inteſtate*, his Eſtate goes firſt to the eldeſt Son and his Iſſue; whom failing, to the ſecond Son and his Iſſue, and ſo downwards. But there is nothing in this Regulation, where a Man dies without Iſſue, to determine who ſhall be his Heir, his elder or younger Brother. Theſe Rules therefore muſt be laid aſide, as of no Uſe to ſupport the elder Brother's Claim. On the other Hand, the Will of the Superior or Father, in excluding the eldeſt Son, does not militate in Favours of the younger, ſince it goes no further than to prefer the ſecond Son to the eldeſt, by no Means to prefer

ſer the third Son. And at any Rate laying aſide the eldeſt Son, becauſe of his Unwillingneſs or Incapacity, an Excluſion which is founded merely on perſonal Conſiderations, cannot be extended againſt his Male Iſſue.

THESE Points being diſcuſſed, one Thing occurs in Favour of the elder Brother. In order to aſcertain the Propinquity, it is natural to caſt about for the Principle which connects the Brothers together, and this is their Father. When we have carried our Thoughts to him, we naturally deſcend to the eldeſt Son, as the firſt Step in the Progreſs of the Mind through the Family. And thus, as the eldeſt Son comes next in View, after the connecting Principle, it will not be ſtrange, in an overly View of the Matter, to prefer him as a Step or Degree nearer to the common Stock than his Competitor is. I ſhall have Occaſion to ſhow hereafter, that this Way of thinking has had its Effect in another Caſe of Succeſſion. But, as here, Cuſtom has given the Preference to the younger Bro-

Brother, there muſt be ſome other Principle in our Nature, or ſome Peculiarity in our Way of thinking, ſufficient to over-balance that now ſuggeſted. For Things eſtabliſhed merely by Cuſtom, without the Influence of external Circumſtances, muſt certainly have a Foundation in Nature.

In ſearching about for this Principle, let us premiſe one Reflection. It will not be thought ſtrange, that the Rules of Succeſſion, which depend upon the natural Connections betwixt Perſons, are, like theſe Connections, founded upon remote Principles; Principles which, at firſt Sight, may appear of little Weight, which are little attended to, and which, notwithſtanding, have their Effect by influencing the Mind. And now to our Subject; in order to explain which, we muſt take a pretty large Compaſs, being to treat of Things which are not commonly reflected on. In tracing out the Actions of our Mind, the following Obſervations will be found juſt. 1*mo*, In the Conception of Objects,

jects, which are real and exiſtent, we take them in their proper Order and Situation, and never leap from one to another which is diſtant, without running over, at leaſt, in a curſory Manner, all the interpoſed Objects. Whether this be a natural Principle, or the Effect of Habit, does not belong to the preſent Subject. I ſhall only obſerve, that the progreſſive Motion, through the Points of Space, of all moving Bodies, is ſufficient to bring on a Habit, and to accuſtom the Mind to the like progreſſive Motion in ſurveying its Ideas. *2do*, After the ſame Manner we always follow the Succeſſion of Time in placing our Ideas, and cannot eaſily be brought to contemplate an Object diſtant in Point of Time, without running over the intermediate Objects. *3tio*, As the Tendency of all Bodies is to move in a ſtreight Line, and in one Direction; as Nature is going on in its Courſe without any retrograde Motion, this Tenor of Things about us, communicates to our Minds the like Tendency: However this be, it is certain, that we more readily

paſs

paſs to the Contemplation of a future Object, than of one that is paſt. The Progreſſion of the Thought, in going from a preſent to a paſt Object, has a diſagreeable Feeling, as if we were walking backward. But when we turn our Thought to a future Object, our Fancy flows along the Stream of Time, and arrives at the Object, by an Order which ſeems moſt natural, paſſing always from one Point of Time to that which immediately follows it. *4to*, The Tendency of Bodies downwards, continually operating upon the Senſes, muſt produce from Cuſtom a like Tendency in the Fancy. Upon this Account the Mind finds a Difficulty in mounting from inferior to ſuperior Objects, as if Ideas acquired a Kind of Gravity from their Objects. *5to*, The Progreſs of Thought to Objects paſt and future, having ſimilar Feelings with the Progreſs to Objects ſituated above and below us, theſe Feelings are commonly taken for the ſame. Hence we imagine our Anceſtors to be in a Manner mounted above us, and our Poſterity to be below us.

THESE

THESE Obſervations will give Light to our Subject. Let us recollect, that it is the Eſtate of a middle Brother which is in Diſpute. If we turn our Thoughts to the elder Brother, the Mind feels ſome ſort of Pain, as if it were aſcending. It is a ſort of retrograde Motion, contrary to the Courſe of Nature. On the other hand, paſſing to the younger Brother is going with the Current, it carries with it the Facility of deſcending. Theſe Things weigh in favours of the younger Brother. The Tranſition of the Thought to the younger being more eaſy than the Tranſition to the elder, gives an Impreſſion of a cloſer Connection or Relation betwixt the ſecond and third Brother, than betwixt the ſecond and eldeſt. For 'tis a Law in our Nature, that the Connection among Objects is ever conſidered to be in Proportion to the Facility of the Tranſition of our Ideas from the one to the other.

IT will perhaps be obſerved, That Principles like what I have been tracing out, which

at

at beſt, make but a ſlender Impreſſion, are little to be relied on, in our Reaſonings upon any Subject. I readily yield, that in reſolving the preſent Queſtion, no Man would heſitate a Moment to divide the middle Brother's Eſtate betwixt the elder and younger, as the equal Method. But what forces us, perhaps reluctantly, into an abſtract Speculation, is the Nature of a Military Feu, which does not admit of a divided Succeſſion. When we are ſo hemmed in, we muſt extricate ourſelves the beſt Way we can. A Deciſion muſt be given, for the Competitors are calling out to have Juſtice done them. And however ſlight this Principle may appear, I muſt obſerve, that it has had Weight enough among our Forefathers to preponderate the Conſideration above ſuggeſted, which weighs for the elder Brother. At leaſt, I will take it for granted, that this is the Principle, till I hear of another capable to make a ſtronger Impreſſion.

And thus a fourth Rule came to be eſtabliſhed in the Succeſſion of Military Feus, that its Courſe is ever to deſcend, never to aſcend.

To proceed to other Matters, I have explained above, one Effect of bringing Land into Commerce, which is that of introducing Primogeniture into all Sorts of Holdings: I ſhall now take Notice of other Effects of this Innovation ſtill more remarkable. The Feudal Law was an Inſtitution adapted intirely to War, admirably contrived for that End. But it was an utter Enemy to Labour and Induſtry, and even, among an indolent People, ſcarce ſufferable in peaceable Times. Such an Inſtitution could not be long-lived. According to the Circumſtances of the Times, and Humours of the People, various Changes were introduced in different Countries, all of them tending to correct its Harſhneſs, and to ſoften it down to a more peaceable Temperament. It is quite wore out in ſeveral Places, and even where it ſubſiſts, it is reduced to a Shadow. As Land is one of the moſt deſirable

rable Objects, the Feudal Law was moſt unnatural in this Reſpect, that the Property of Land was altogether withdrawn from Commerce, and ſcarce any Means to come at the Poſſeſſion and Uſe of it, but by military Service. The Hardſhip was not much felt in Times of War: But after the Arts of Peace began to be cultivated, Manufactures and Trade to revive in *Europe*, and Riches to encreaſe, this Inſtitution behoved to turn extreme burdenſome. It firſt tottered, and then fell by its own Weight, as wanting a ſolid Foundation. All Parties conſpired againſt it, even theſe who were moſt intereſted to ſupport it. Superiors began to find, that they could make more of their Lands than by allotting them for military Service. They were willing to change this Service for Rent, and the Tenants turning themſelves to Induſtry, or at leaſt fond of Independency, were pleaſed with the Exchange. Other Superiors, to ſupply Means for Luxury, and tempted with a Price, were willing to give off detached Pieces of Land. And thus, by Degrees,

Lands

Lands returned to their original Condition of being the principal Subject of Commerce.

THIS behoved to introduce ſome new Regulations with regard to Succeſſion. A Man who gets Lands as a Gratuity, or the Uſufruct of it, in Name of Wages, may reaſonably be confined within the ſtricteſt Bounds. But he who purchaſes Land, and pays a full Price, propoſes to have it under his own Management, and at his own Diſpoſal. He propoſes particularly, when he dies, that it ſhall go to his Heirs without Limitation. And the Perſon who aliens, ſuppoſing him to retain the Superiority, finds it his Intereſt to agree to thoſe Conditions, ſince upon that Account he gets a greater Price for the Subject. Perhaps this was not provided for in the firſt Purchaſes which were made. People who have Money to beſtow, will take Land upon any Terms rather than want. But as the Appetite for Liberty and Independency is active and univerſal, there will always be found Purchaſers to pay for theſe Conveniencies;

cies; and they who ſtand in Need of Money, will be tempted to diſpoſe of every Thing that can procure it. And thus by Degrees, the Succeſſion to Heirs whatſoever was introduced into Feudal Rights: That is, collateral Succeſſion, properly ſo called, took Place, which was not formerly known.

FROM this Deduction it will be obvious, that, for a conſiderable Time, collateral Heirs were only admitted to ſucceed in Feus purchaſed with Money, or other valuable Conſideration. Military Feus would remain upon their old Footing, excluſive of collateral Succeſſion. And thus the Notion of Conqueſt came in, as oppoſed to Heritage, or what came to the Vaſſal from his Anceſtors by Deſcent. And during this Period there certainly was no Diſtinction betwixt *feuda vetera et nova*, but betwixt Feus acquired by Purchaſe, which behoved all to be late, and Feus granted for military Service, which might be either old or new.

WHEN

When once this Matter of collateral Succeſſion came to be generally known, it grew into common Repute, and every Perſon did aim at it. And as Bargains of all Sorts about Land came into Practice, the mixed Nature of ſuch Bargains, partly onerous, partly gratuitous, did quite confound the Diſtinction eſtabliſhed betwixt a Purchaſe and a Grant for military Service; and ſo by Degrees it crept into the Feudal Law, that new Acquiſitions of Land, for whatever Cauſe, did go to Heirs whatſomever. And this behoved to introduce a new Diſtinction betwixt *feuda vetera et nova*. Under *feuda nova* were comprehended Feus purchaſed at whatever Time, and late Feus granted for whatever Cauſe; in all of which collateral Succeſſion did obtain. Under *feuda vetera* were comprehended all the old Feus granted for military Service, which did only deſcend to the Male Heirs of the original Vaſſal. As theſe old Feus are long ago wore out, this Diſtinction betwixt *feuda vetera et nova* muſt be at an End. And now, at leaſt in this Iſland,

Iſland, every Land Right goes to Heirs whatſomever, unleſs the contrary be ſpecified.

At what Periods theſe ſeveral Changes in the Feudal Succeſſion were introduced, is not certainly known. Hiſtory does not deal in ſuch Matters; for Lawyers are ſeldom Hiſtorians, and Hiſtorians as ſeldom Lawyers. But as we have Traces of theſe Diſtinctions in our Law-books, tho' obſcurely handled, the Original of collateral Succeſſion, and its ſeveral Enlargements, do follow ſo naturally the Increaſe of Trade and Riches, that there is no reſiſting the Conviction which ariſes from the above Deduction. Let us but conſider, that once there was no collateral Succeſſion in the Feudal Law, and that now it is univerſal, not by Statute, but by Practice, and we will find the ſeveral Gradations above mentioned natural and eaſy, nay, what muſt neceſſarily have happened by the Progreſs of Arts and Sciences, which inſpired us not only with a Taſte for Liberty and Independency, but made

Riches

Riches flow in among us, wherewithal to purchaſe theſe Bleſſings.

HAVING opened up the Origin of collateral Succeſſion in the Feudal Law, and the Progreſs of it thro' its various Changes, with regard to the Subjects in which it did, and does now obtain. I go on to examine who theſe collateral Heirs are who have a Right to ſucceed.

LET us ſuppoſe a ſecond Brother makes a Purchaſe of Land, and dies without Heirs of his Body, whereby the Succeſſion opens to his Collaterals, the Queſtion is, whether the elder or younger Brother ſhould be preferred. The Principle above laid down favours the younger, that it is natural for Heritage to deſcend, and unnatural that it ſhould aſcend. Further, this was become a Standard Principle, and conſtantly applied to give Preference to the younger Brother, in the Succeſſion of Eſtates devolving from a Father to a middle Brother. And it will be obſerved, that

that the Principle here ought to have the greater Effect, as acting without a Counterbalance. In the Caſe of Heritage, where the Eſtate deſcends from the common Father, we are apt to turn our Thoughts upon him, from whence they naturally fall upon his eldeſt Son. This Circumſtance does not militate againſt the younger Brother, in the Caſe of an Eſtate acquired by a middle Brother; for the Eſtate being his own Conqueſt, we are not prompted to look further back. In a Word, if the younger Brother is preferred in Heritage, notwithſtanding of a certain Propenſity in favours of the eldeſt, much more ought he to be preferred in Conqueſt, where there is no ſuch Propenſity againſt him. Yet in Fact the elder Brother is preferred by all Nations who have embraced the Feudal Law. And this will not appear ſtrange, when the Circumſtances of Time are attended to. We have a Propenſity in our Nature to act upon general Principles, as being eaſy in their Application, by avoiding Intricacies, which more abſtract Reaſoning muſt lead us into. The Right of

Primogeniture was but growing into Faſhion when the Rules of Succeſſion in Heritage were ſettled, and ſo had not Weight enough to counterbalance a natural Impulſe. But by the Time that Land came to be the common Subject of Commerce, the Right of Primogeniture was eſtabliſhed as a general Principle, and as the common Law of the Land. Inſtances of preferring the younger Brother in the Succeſſion of the middle Brother's Eſtate, behoved to be rare, in Compariſon of preferring the elder Brother to the Father's Eſtate, and ſuch rare Inſtances making no Figure, in Oppoſition to the general Rule, the Right of Primogeniture was readily laid hold of to determine this Point. And when the Error is ſo common of ſubſtituting Names for Things, it will be no Surpriſe, that this was made the determining Rule, tho' in ſtrict Thinking it does not meet the Caſe. After the Hint is given, nothing can be more obvious, than that the Cauſe of preferring the eldeſt Son to the Father's Succeſſion, does by no Means apply to the Succeſſion of a younger Brother.

But we are no ſooner extricated out of one Labyrinth, than we are involved in a greater. If a third Brother dies poſſeſſed of Conqueſt, the Succeſſion, by the Law of *Scotland*, goes to the immediate elder, by the Law of *England* to the eldeſt. What are the Foundations of theſe different Opinions, and which the moſt agreeable to Principles, may not be an uſeleſs Enquiry. The *Engliſh* who got the Start of us in Law-matters, have been guided in the Deciſion by the Principle of Primogeniture; and indeed, after conferring the ſecond Brother's Eſtate upon the eldeſt, moved by this Principle, it was an eaſy Conſequence to confer upon him alſo the third Brother's Eſtate. Our People, in the Infancy of their Law, ſwayed more by natural Feelings, than by general Principles, have judged of this Matter after a different Manner. Beginning at the third Brother whoſe Eſtate was in Queſtion, it has been obſerved, that the Mind in its Progreſs would paſs firſt to the ſecond Brother, and from him to the eldeſt. In this Way the ſecond Brother was conſidered as one

Step

Step nearer to the Deceaſed than the eldeſt is, and ſo was preferred to the Succeſſion.

'Tis probable the Feudal Law was introduced into *Scotland*, before an Opportunity offered of fixing this Point in *England*, otherways it would have come along to us, with their other Feudal Cuſtoms. Thus we were left to our own Way of thinking in ſolving the Problem. And tho' we have determined the Point, by Similitude of Diſtance and progreſſive Motion, yet it appears, that ſome of our Lawyers have reaſoned not quite uniformly upon this Subject. The learned *Craig* puts a Caſe, *L.* 2. *Dieg.* 15. § *ult.* It is of four Brothers, three of the firſt Marriage, the fourth of a ſecond. The fourth acquires a Land Eſtate, and dies without Iſſue. Our Author obſerves, that other Lawyers were for preferring the immediate elder Brother, tho' of a different Marriage; and ſuch, no doubt, at preſent, is the Law of *Scotland*, whatever Difficulty there might be in the Queſtion before the Rule was eſtabliſhed in Practice;

tice; he is for preferring the eldeſt Brother, "Becauſe (ſays he) in the Caſe of different "Marriages, the Connection or Conjunction "begins at the eldeſt, and paſſes thro' him to "the ſecond and third." This is obſcurely ſaid, but it is not difficult to gather what our Author had in View. The Argument, when brought out to Light, is ſubtile and ingenious. Where the Brothers are all cloſely united by being of the ſame Marriage, we feel an intimate Connection amongſt them, without thinking of the connecting Principle. But amongſt Brothers of different Marriages, the firſt Idea that preſents itſelf, is rather that of Difference and Oppoſition, than of Union. This forces us when we inveſtigate the Relation, to caſt about for a connecting Principle, which we find to be the common Parent; and as from him the firſt Step is to the eldeſt Son, we conceive this Son to be one Step nearer than the ſecond, and two Steps nearer than the third.

When the Matter of Succeſſion depends upon ſuch remote Foundations, and upon ſuch ſlight Feelings, 'tis no Wonder the Cuſtoms of different Nations ſhould be ſo different, and that there ſhould not even be any uniform or conſiſtent Plan of Succeſſion in the ſame Nation: And indeed ours, in particular, is far from being uniform. Another Miſtake has crept into our Law, and into all our Law-Books, leſs excuſeable than any above ſuggeſted. Let us recollect the Diſtinction mentioned above, betwixt *feuda vetera et nova*. In the firſt Claſs were the old Feus eſtabliſhed upon the Footing of military Service, where the Succeſſion was confined to Male Deſcendents of the original Vaſſal, and which conſequently behoved gradually to deſcend, and could never aſcend. The other Claſs comprehended Purchaſes, and all late Feus granted for whatever Cauſe, which went to Heirs whatſomever. In theſe, when the Succeſſion opened to Collaterals of the original Vaſſal, the eldeſt Brother and his Deſcendents were preferred as the Heirs of

Line,

Line. 'Tis mighty plain, that theſe *feuda nova* could never become *feuda vetera* in any Courſe of Time, ſo as to exclude collateral Succeſſion, or to bar Succeſſion by Aſcent. If Conqueſt go to the elder Brother, where the Acquirer a middle Brother, dies without Iſſue, no imaginable Reaſon can be given why it ought not to go in the ſame Channel, where the Acquirer leaves a Son who ſucceeds, and dies without Iſſue. In one Word, collateral Succeſſion, and Succeſſion by Aſcent, ought to be convertible Terms; if in any one Caſe the eldeſt Brother is the lineal Heir, he ought to be conſidered as ſuch in every Caſe of collateral Succeſſion. But theſe Matters firſt took Footing in the Days of Ignorance, when the Conceptions of Mankind were groſs and inaccurate. What it may be in other Countries I know not, but in the Practice of *Scotland* a very motely Scheme is eſtabliſhed. We conceive nothing to be a *feudum novum*, but an immediate Acquiſition. If it has once paſt by Succeſſion, we underſtand it to be a *feudum*

anti-

antiquum, or Heritage, not ſo indeed as to exclude collateral Succeſſion, but ſo as to make the Succeſſion for ever after to deſcend, and never to aſcend. And we have been led into this Practice by an Error, apt, as above obſerved, to ſlip into all Sorts of Reaſoning, which is that of miſtaking Words for Things. Not attending to the Import of the Diſtinction betwixt *feudum antiquum et novum*, we took up with the Word, and deſerted the Meaning, and ſo by Degrees came to conceive every old Feu to be *feudum antiquum*. And as there are no preciſe Boundaries betwixt what is old and what is new, we were forced, at laſt, to fix upon this Rule, That whatever has paſt by Succeſſion, is to be underſtood a *feudum antiquum*. And having once introduced this arbitrary Diſtinction, in Place of the former, we unwarily applied to it theſe general Rules, which do apply only to the original Diſtinction betwixt *feudum antiquum et novum*: Nothing can be more groſs. In Place of the proper Diſtinction betwixt *feudum antiquum et novum*, to ſubſtitute

ſtitute another of a quite different Kind, that has no Relation to it but the Name; and yet to miſtake this new invented Diſtinction for the old, ſo as to give it the ſame Effect in Law, was certainly confounding Things in a ſtrange Manner, and what could only happen in the Days of groſs Ignorance. It is very true, that we went no further than to exclude the Privilege of Primogeniture, where a Feu had once been taken up by Succeſſion. We never conſidered it to be a *feudum antiquum* in any ſuch proper Senſe, as to exclude collateral Succeſſion. Falſe Reaſoning could ſcarce lead us ſo far. In judging of a nice Caſe, ſuch as the Competition betwixt two Brothers, we might be led to ſubſtitute one Idea for another, the *feudum antiquum* for the *feudum novum*, eſpecially if the Diſpute happened about a Feu that was really old, or of a long ſtanding. But, in a Diſpute betwixt the Heir of the Vaſſal and the Superior, where the Queſtion behoved to turn upon a Point of Fact, whether the Feu was granted after the Period that all Grants of this

Kind were underſtood to go to Heirs whatſomever, there could be little Room for Miſtake.

And now to explain the Terms of *Heir of Conqueſt* and *Heir of Line*, let us ſuppoſe a *feudum novum* and a *feudum antiquum* properly ſo called, centered both in a middle Brother: The laſt, 'tis plain, cannot be, but by a Deſtination excluding the eldeſt Brother. Or let us ſuppoſe them both to be *feuda nova*, the one purchaſed by the ſecond Brother himſelf, the other eſtabliſhed in his Perſon by virtue of a Deſtination. Or, conform to our preſent Practice, let the one be a Purchaſe, the other a Subject to which he derives Right, as repreſenting a younger Brother. The eldeſt Brother will ſucceed in the Lands conqueſt by the middle Brother, the younger will ſucceed in the Lands that came to the middle Brother by Succeſſion. And ſo it may often happen, that the ſame Perſon's Succeſſion is ſplit and divided betwixt two Male Repreſentatives, the one named *the Heir of Line*,

Line, the other *the Heir of Conqueſt*. Theſe Names are only uſed in the particular Caſe where both repreſent the ſame Perſon: In other Caſes where there is no Occaſion to make the Diſtinction, they paſs under the common Appellation of *Heirs at Law*. For Example, an eldeſt Son, ſucceeding to Lands purchaſed by his Father, is not ſtiled *Heir of Conqueſt*, but *Heir at Law* or *of Line*. But with Regard to this, tho' the elder Brother is named *Heir of Conqueſt* in Oppoſition to the younger, who has the Name of *Heir of Line*, we muſt beware not to conſider the Heir of Conqueſt as a limited Heir. 'Tis certain he is *eadem perſona cum defuncto*, and as univerſal a Repreſentative as the Heir of Line, properly ſo called, can be. And ſo ſays the Lord *Stair*, *Tit.* (*Heirs*) § 10. And he aſſigns a very ingenious Reaſon for giving to the younger Brother the Title of *Heir of Line*. "The "elder Brother (ſays he) is called *the Heir* "*of Conqueſt*, and the other retaineth the "common Name of *the Heir of Line*;" which is ſaying, that the younger Brother is allowed

allowed to retain a Name common to both, for want of another Term to diſtinguiſh him by.

TOUCHING Heirſhip Moveables, Tacks, Penſions, or other ſuch Rights from which the Executor is excluded, and which, properly ſpeaking, are not Land Rights, it is ſettled in Practice, that all of theſe go to the Heir of Line, and not to the Heir of Conqueſt. The Ground of this Practice may be readily gathered. Let us recal what is obſerved above, that the Right of Primogeniture, at firſt confined to military Feus, was gradually extended to take Place in the Succeſſion of Males, whatever was the Nature of the Feu. But as there had been no Example of the Right of Primogeniture in the Succeſſion of Females, our Forefathers did not think of carrying this Right beyond the Practice, and ſo confined it to the Male Succeſſion. The ſame has happened here. The Privilege of Primogeniture had only taken

Place

Place in Succeſſion to Lands; and as there was no Example or Authority to determine the Point touching the Subjects now in Queſtion, the natural Feelings prevailed, and the Propenſity to paſs downwards, or according to the Succeſſion of Time.

PART II.

TO complete this Subject, it will be neceſſary to take a View of the Tranſmiſſion of Moveables from the Dead to the Living, and of the different Changes this Species of Succeſſion has undergone in *Britain*.

HISTORIES in all Ages are full of the Encroachments of the *Roman* Clergy. There is no End of the Artifices uſed by them to uſurp Power and Riches. Yet it appears ſtrange, that by all the Hiſtorians, who write with great Spirit againſt them, one of their moſt ſucceſsful Stratagems to ingroſs Money ſhould be omitted; inſomuch, that we are entirely indebted to our Statute-book, for keeping in Memory one of the moſt notorious Pieces of Prieſt-craft ever was practiſed. Would any one believe, that there is a Country, and in *Europe* too, where the Clergy gained ſuch an Aſcendant over the Minds of the People, as tamely to ſuffer the moveable Eſtate of every Man who died inteſtate, to be

ſwal-

ſwallowed up by them. Thoſe who draw their Notions from the preſent Age, will ſcarce give Faith to the Story, that Superſtition could ever be ſo prevalent, in any Age, as to produce a Law preferring the Biſhop to the next of Kin. But let them ſuſpend their Wonder for a Moment, till they learn the whole Extent of this Law. It did not ſtop at excluding the Relations of the Deceaſed, ſuppoſing them to be his Children. The Wife was excluded. Nay the Creditors were excluded. All was given to the Biſhop *per averſionem*. Of *Britain* we are talking, and yet the ſhameleſs Rapacity was ſuffered here for Ages. We may believe ſuch a monſtrous Practice could not be eſtabliſhed at once. It crept in by Degrees. The Foundation was laid in a Doctrine ſedulouſly inculcated, That the moveable Effects of every dead Perſon, failing his own Appointment, ought to be laid out for promoting the Good of his Soul. This brought the Clergy into the Play. The *Ordinary* pretended at firſt but to give Advice, but this Advice, in Proceſs of Time, gained Authority,

and

and became a Command. At last the Mask was thrown off, and the Ordinary, without Ceremony, took up the Possession, without deigning to account to any Mortal. Let us hear a grave Author * upon this Subject. "Originally the Goods of the Intestate pas-"sed by a kind of Descent to the Children; "afterwards by a *Saxon* Law, the Wife had "her Part. In *Henry* I's Time the Clergy "had gotten a Taste; for altho' the Wife "and Children, or next of Kin had then the "Possession, yet it was for the Good of the "Soul of the Deceased; and the Ordinary had "a directing Power therein, and was in the "Nature of an Overseer, and somewhat more. "Afterwards, in the Time of King *John* the "Clergy had drawn Blood; for tho' the Pos-"session was as formerly, yet the Dividend "must be made in the View of the Church; "and by this Means the Dividers were but "mere Instruments, and the Right was va-"nished into the Clouds. But in *Henry* III's "Time,

* *Bacon's* Discourse of the Laws and Government of *England*, Part I. Cap. 66.

" Time, the Clergy had not only gotten the " Game, but gorged it: Both Right and Poſ- " ſeſſion was now become theirs, and Wrong " done to none but the Clouds."

And ſo it came to be ſettled *, That if a Man died inteſtate, neither his Wife, Children, nor next of Kin, had Right to any Share of his Eſtate, but the *Ordinary* was to diſtribute it according to his Conſcience, to pious Uſes; and ſometimes the Wife and Children might be amongſt the Number of thoſe whom he appointed to receive it; but however, the Law truſted him with the whole Diſpoſition.

The firſt Statute that limited the Power of the *Ordinary* was 13th, *Edward* I. *C.* 19. by which it is enacted, " That where a Man " dies inteſtate, and in Debt, and the Goods " come to the *Ordinary* to be diſpoſed, he " ſhall ſatisfy the Debts ſo far as the Goods

 " extend,

* New Abridgement of the Law, Tit. *Executors and Adminiſtrators*, P. 398.

" extend, in ſuch Sort, as the Executors of " ſuch Perſon ſhould have done, in caſe he " had made a Will." Afterwards the actual Poſſeſſion was taken from the *Ordinary*, by obliging him to give a Deputation *to the next and moſt lawful Friends of the Inteſtate, for adminiſtrating his Goods.* 31ſt *Edward* III. *Cap.* 11. But this Statute proved but a weak Check to the Avarice of the Clergy. Means were fallen upon to elude it, by preferring ſuch of the Inteſtate's Relations who were willing to offer the beſt Terms. This corrupt Practice was ſuffered to the Days of *Henry* VIII. when the Clergy loſing Ground, the Statute 21. *Henry* VIII. *Cap.* 5. was enacted, bearing, " That in caſe any Perſon " die inteſtate, or the Executors refuſe to " prove the Teſtament, the *Ordinary* ſhall " grant Adminiſtration to the Widow, or to " the next of Kin, or to both, taking Surety " for true Adminiſtration."

This Statute, as it points out the particular Perſons who are intitled to have Letters of

of Adminiſtration, without leaving any Choice to the *Ordinary*, was certainly intended to cut him out of all Hope of making Gain of the Effects of Perſons dying inteſtate. But the Church does not eaſily quit its Hold. Means were fallen upon to elude this Law alſo. Tho' the Poſſeſſion by theſe Statutes, was wreſted out of the Hands of the *Ordinary*, yet his Pretenſions ſubſiſted entire, of calling the Adminiſtrator to account, and obliging him or her to diſtribute the Effects to pious Uſes. This was an admirable Engine in the Hands of a Churchman for ſqueezing Money. We may readily believe, that the Adminiſtrator who gave any conſiderable Share to the Biſhop, to be laid out by him, without Doubt! upon pious Uſes, would not find much Difficulty in making his Accompt. It was probably this rank Abuſe, which moved the Judges of *England* ſolemnly to reſolve, That the Ordinary, after Adminiſtration granted by him, cannot compel the Adminiſtrator to make Diſtribution *. But at laſt the Right of the

* Laſt mentioned Author, P. 414.

the next of Kin was fully eſtabliſhed by Statute 22 and 23. *Car.* II. *Cap.* 10. which enacts, That after Payment of Debts, Funerals and juſt Expences of all Sorts, the Surpluſage ſhall be diſtributed as follows: "One "Third to the Wife of the Inteſtate, the Re- "ſidue amongſt the Children, and ſuch as "legally repreſent them, if any of them be "dead. If there be no Children, nor legal "Repreſentatives of them, one Moiety ſhall "be allotted to the Wife, the Reſidue equal- "ly to the next of Kin to the Inteſtate, in "equal Degree, and thoſe who repreſent "them. But no Repreſentation ſhall be ad- "mitted amongſt Collaterals, after Brothers "and Siſters Children. And if there be no "Wife, all ſhall be diſtribute amongſt the "Children; and if no Child, to the next of "Kin to the Inteſtate in equal Degree, and "their Repreſentatives."

We may reaſonably conjecture, that the Church was equally ſucceſsful in both Parts of the Iſland. We have undoubted Evidence that

that ſo early as the Days of our King *William*, which was in the twelfth Century, the *Ordinaries* or Biſhops had wrought themſelves into the Poſſeſſion, and Adminiſtration of the moveable Effects of Perſons dying inteſtate. Their Pretext muſt have been the ſame as in *England*, to diſtribute the Effects for pious Uſes, in order to promote the Good of the Soul. Upon ſuch a Foundation no Action at common Law could be competent to oblige the *Ordinary* to accompt, whether at the Inſtance of the Wife, Children, or Creditors. The Diſtribution was to be left to his Direction, and upon his Conſcience. And what ſeems to put this paſt Doubt is, that it required a Statute here as well as in *England*, to oblige the *Ordinary* to do Juſtice even to Creditors, who are, of all certainly the moſt privileged. All this appears from the 22d Chapter of the Statutes of King *William*. The Words are, " After the Deceaſe " of any Man inteſtate, and owing Debts to " Creditors, his Goods ſhall be diſponed by " his *Ordinary*, and the *Ordinary* ſhall be o-

" bliged

" bliged to anſwer for the Debts, ſo far as the " Goods and Gear will extend, in the ſame " Manner as Executors named by the Defunct " are bound to do." This Statute is full Evidence that in this early Age, the Biſhops were taking Liberties contrary to Conſcience, and the Truſt repoſed in them, even ſo far as to defraud the Inteſtate's Creditors. We may believe the Cry was great before the Remedy was applied; and yet this did not open the Eyes of our Lawgivers. The Wife, Children, and neareſt of Kin were left intirely at the Mercy of the Church. It is true, the Evil was not greatly felt, becauſe it was in every Man's Power to prevent it, by making a Will. And it was probably urged in Favours of the Church, that it muſt be the preſumed Intention of every Man who makes no Will, to leave the Management of his moveable Eſtate to the *Ordinary*.

But Caſes occurring of Perſons dying under Age, who are incapable of making a Teſtament, our People began to perceive the Weak-

Weakneſs of the Church's Argument from Intention; for the Ordinary made no Difficulty of ſeizing the Poſſeſſion alſo in this Caſe, tho' he had not even the Pretext of an implied Intention. This Practice therefore was thought a Grievance, and a Statute was made to redreſs it. The Preamble of the Act 120. *P.* 1540. is, "That whereas "Perſons often dying young, who cannot "make a Teſtament, the Executor named "by the Ordinary does notwithſtanding intromit with the whole Goods, and withdraw the ſame from the neareſt of Kin, "who ſhould have the ſame by Law:" Therefore enacted, "That when any Per"ſon dies who cannot make a Teſtament, "their next of Kin ſhall have their Goods, "without Prejudice to the *Ordinary*'s Claim "of a Quote."

This Statute laid the Foundation of a legal Claim, which was ſoon thereafter enlarged. One Article of the Inſtructions 1563, given to the Commiſſaries is, "That if one die "in

" inteſtate, or his Executor nominate refuſe to " accept of the Office, the Commiſſaries muſt " give the Office to the neareſt of Kin, be- " ing willing to find Caution." This is copied from the above mentioned Statute of *Henry* VIII. enacted a few Years before. But the Regulation had ſtill a better Effect in *Scotland* than in *England*. It required a Statute there to complete the Right of the next of Kin, and to protect them from the Encroachments of the Clergy. But in *Scotland* the Biſhops, immediately upon the Reformation, having loſt all Authority, the next of Kin getting Letters of Adminiſtration from the Commiſſaries, came of Courſe to retain the Effects, without having any to accompt to, ſave to thoſe who had a natural Right. The Biſhop had loſt his Claim, and the Commiſſaries never had any.

I OBSERVE, that in the above Article of the Inſtructions 1563, no Mention is made of the Relict, tho' her Intereſt is expreſly taken Care of in the *Engliſh* Statute, whence the Ar-

Article is copied. This could not have happened by Inadvertency. My Conjecture is, that our Judges have taken the honeſt Liberty to ſuſtain Action againſt the *Ordinaries*, to the Relict for her Third, and to the Children for their Legitim, in Imitation of King *William*'s Statute affording Action to Creditors. If a legal Claim was afforded to the Wife and Children by the Practice of the Courts of Law, it was unneceſſary to make any further Proviſion for them in the Inſtructions 1563; and ſo the Article is confined to the next of Kin, who formerly had no Claim. And it was extreme natural for our Judges to take this Liberty, conſidering that the Wife and Children, by the common Law of the Land, had an unexceptionable Claim againſt the Executor nominate. And it might well be thought ſtrange and unaccountable, that a Man ſhould have it in his Power to defraud his Wife and Children of their juſt Claim, by forbearing to make a Will, or that the *Ordinary* ſhould not be liable as well as the Executor nominate.

THUS the Right of the neareſt of Kin is eſtabliſhed, where the Predeceſſor dies inteſtate. But where a Teſtament is made, which is the more frequent Caſe, they were left without Remedy, unleſs Proviſion was made for them in the Teſtament. They had no Right hitherto eſtabliſhed in them, ſave the Privilege of being preferred to all others in the Office of Executry. But this Privilege could not take Place where an Executor was named by the Deceaſed, nor was any Action competent at common Law to oblige the Executor nominate to account to them. 'Twas underſtood to be the Will of the Deceaſed, that the Diſtribution ſhould be left to the Diſcretion of the Executor, where the contrary was not expreſſed; juſt as formerly it was underſtood to be his Will to leave all to the Diſcretion of the *Ordinary* where he died inteſtate. And thus it happened, that the very Nomination intitled the Executor to retain to himſelf the free Moveables, even where he was not named univerſal or reſiduary Legatar. This was remedied by the Act 14. *P.* 1617.

which

which gives to the next of Kin the like Action againſt the Executor nominate to accompt for the Effects confirmed, that was before competent againſt him at the Inſtance of the Wife and Children.

Our Law then with Regard to the Intereſt of the neareſt of Kin, ſtands thus. Where the Predeceſſor dies inteſtate, they are privileged to be Executors, or Adminiſtrators without accompt, and of conſequence to retain the free Effects. Where he makes a Will, they are intitled to call the Executor to accompt. But where by Overſight or Accident they happen not to apply, *debito tempore*, to be confirmed Executors, ſo that a Creditor gets the Office, or perhaps the Procurator-fiſcal, I ſee no Remedy. There is certainly no Action given in this Caſe to the next of Kin againſt the Adminiſtrator or Executor-dative to accompt, as there is in the Caſe of an Executor nominate. Nor is there *par ratio*, as it muſt be the Fault of the next of Kin, if they are cut out of their Right where the Predeceſſor

dies

dies inteſtate; And the Inſtructions to the Commiſſaries 1666, do take it for granted, that no ſuch Action is competent; for it obliges the Procurator-fiſcal, who failing others, is allowed to confirm, to accompt to the Archbiſhop or Biſhop, he having three Shillings for every Pound he brings in and makes Payment of. Yet where ſo many Steps are taken to found the next of Kin in a legal Claim, we are naturally led to complete the Scheme, by giving them a Right in every Caſe. And it is extreme likely, that if ſuch a Queſtion come before the Court of Seſſion, the Judges will ſuſtain a Claim at the Inſtance of the next of Kin againſt an Executor Creditor, and *multo magis* againſt the Procurator-fiſcal confirming. And what leads me to think ſo, is the Act of Sederunt 14th *November* 1679, in which it is taken for granted, that an Executor Creditor is liable to accompt, not only to the Relict and Children, but to the next of Kin.

From this ſhort Hiſtory of the Tranſmiſſion of Moveables from the Dead to the Living,

ving, it will be evident that there is no ſuch Thing, properly ſpeaking, in the Law of this Iſland, as an Heir *in mobilibus*. If a Will is made, the Form of it is to name an Executor, or Truſtee, to diſtribute the Effects; and ſometimes this Diſtribution is left to be made by the eſtabliſhed Rules of Law, ſometimes Directions are given in the Will itſelf, as where a certain Sum is appointed to be paid to this or that Perſon, commonly called a Legacy. If the Perſon dies inteſtate, the whole moveable Effects are underſtood to be *eo ipſo* veſted in the *Ordinary*, or in Place of him, the Commiſſaries in *Scotland*, not in the Quality of Heirs, but as Truſtees to diſtribute the Effects to pious Uſes. Accordingly no Perſon is legally intitled to take Poſſeſſion of an Inteſtate's Effects, otherways than by an expreſs Warrant from the *Ordinary* or Commiſſaries. And after the Reſtoration, the Biſhops in *Scotland* took great Care to preſerve their Right. They had Spies in all Corners, and no ſooner was a Man laid in his Grave, than they thundered out all the Artillery of the Law, to force his Rela-

Relations to apply for Letters of Adminiſtration. But this Grievance, among others, was redreſſed after the Revolution. What was ſuffered with Impatience under the Juriſdiction of Biſhops, was not at all to be endured under the Juriſdiction of their Shadow, the Commiſſaries. Accordingly a Statute was made, Act 26, *p.* 1690, diſcharging ſuch Proſecutions in Time coming, "That no Perſon "ſhall be bound to give up Inventary of a De"funct's Goods, and that there ſhall be no "Confirmation, unleſs at the Inſtance of the "Relict, Children, neareſt of Kin, or Cre"ditors." The Intendment of this Statute, tho' not ſaid directly, is to transfer to the Children or next of Kin, the Property of the Moveables which belonged to the Deceaſed, without requiring any other Act or Solemnity, but barely the apprehending of Poſſeſſion. This will be obvious, from conſidering that, by the common Law, there is no other Form known, of acquiring the Property of Moveables, which belonged to a deceaſed Perſon, but by Warrant of the *Ordinary* or Commiſſaries,

miſſaries. And when this Form is diſpenſed with, without ſubſtituting any other, Poſſeſſion alone muſt have the Effect. It is true, Confirmation is not altogether laid aſide; it is ſtill of Uſe to preſerve the Intromitter from being liable to Creditors beyond the Value of the Subject. But if the Children or neareſt of Kin are willing to take their Hazard, they may ſafely enter into Poſſeſſion, without applying for a Title. And thus, after much wandering, the Tranſmiſſion of Moveables from the Dead to the Living is brought back to its natural Channel, and reduced to the ſimpleſt Form.

It remains only to be obſerved, That tho' in *England* the *jus repræſentationis* is introduced to a certain Extent, in the Succeſſion of Moveables *ab inteſtato*, we have not thought proper to follow this Practice. We adhere ſtrictly to the Law of Nature in moveable Succeſſion, by preferring the next in Blood, without Diſtinction betwixt Male and Female, and without regard to the Privilege of Primogeniture.

APPEN-

APPENDIX

TOUCHING

The HEREDITARY *and* INDEFEASIBLE RIGHT *of* KINGS.

THE hereditary-indefeaſible Right of Kings, and Paſſive-obedience and Non-reſiſtance its genuine Offspring, are Doctrines which of late have made a great Noiſe in *Europe*, and particularly in this Iſland. Some Reflections upon this Subject, ſuggeſted by the preſent unhappy Times, will make a proper Appendix to the above Eſſay.

WHEN we conſider Man, abſtracted from all poſitive Engagements, we find nothing in his Nature, or in his Situation, to ſubject him to the Power of any, his Creator, and his Parents excepted. The parental Power is at an End, when Children are grown up, and can provide for themſelves. At any Rate the parental Power cannot ſubſiſt longer than the Life of the Parents; for it is not a Matter of Property to be tranſmitted by Succeſſion, ſince

it

it depends upon perſonal Circumſtances. And ſuppoſing it a Subject to be taken by Succeſſion, it muſt deſcend to all the Children equally, at leaſt to all the Sons equally; for Primogeniture, 'tis certain, is not a Right of the Law of Nature, but a Conſequence only of the Feudal Law. Hence it is a Principle embraced by the graveſt Writers, that all Mankind are born free, and independent of one another.

MAN indeed is fitted for Society. His Wants prompt him to it, and his Inclinations render it agreeable. Accordingly we find Mankind almoſt everywhere parcelled out into Societies, which have been originally formed by accidental Circumſtances, more or leſs extenſive. A Society of any Extent cannot be without Government. The Members muſt have Laws to determine their Differences, and they muſt have Rulers to put their Laws in Execution. At the ſame Time, we find the Conſtitutions of different States, with regard to Government, almoſt as various, as are the

Sentiments of Men concerning it: So that tho' Government be neceſſary to the Well-being of Society, yet from this Circumſtance alone, were we to look no further back, we may conclude no particular Form to be neceſſary, but the Effect of Choice, or perhaps in ſome Meaſure of Accident.

Let us trace this Matter further, becauſe it is of Importance. Man is a ſhy Animal, and in his original State, rather averſe to Society. In that State his Wants were few, and eaſily ſupplied; therefore we may readily conclude, that while Acorns were the Food of Man, and Water his Drink, there was neither Uſe nor Appetite for Society. Accordingly we find Mankind originally in every Corner of the Earth living in ſcattered Habitations, with little Intercourſe, except among the Members of the ſame Family. The Culture of Corn laid the Foundation of a more extenſive Intercourſe, becauſe thereby mutual Aſſiſtance became neceſſary. When Arts were invented, and Induſtry increaſed, it was found

found convenient to herd together in Towns and Villages. From this cloſſer Connection one Evil ſprung, Oppoſition of Intereſts, formerly rare; which at firſt was the Occaſion of Quarrels and Bloodſhed, and afterwards of frequent Appeals to Men of Weight and Probity. In Time the Neceſſity of fixed Judges to determine Differences being diſcovered, the Election of theſe Judges, which could not otherways be than popular, was the firſt Step to Government. The chief Magiſtrate therefore was originally no more but the chief Judge, whoſe Powers were gradually extended, as Caſes occurred, which required the Interpoſition of a Superior or Governor. War introduced Slavery, as it ſubjected thoſe taken in Battle to the arbitrary Will of their Conquerors; and abſolute Power was too deſireable an Acquiſition, to be the Perquiſite of Subjects only. The chief Magiſtrate, however repugnant it is to the Nature of his Office, did often graſp at it: And Hiſtory informs us, That the chief Magiſtrate, in different Societies, has been often but too ſucceſsful,

ceſsful. In a Word, abſolute Independence and abſolute Power are the two Extremes; and the latter, at leaſt ſo far as concerns Sovereignty, could never have been introduced, but by paſſing through all the intermediate Degrees.

GOVERNMENT therefore is one of the Arts which Neceſſity has ſuggeſted, which Time and Experience have ripened, and which muſt be perpetually ſubject to further Improvements. For Government, like all other Arts, being invented for the Good of Mankind, it muſt be the Privilege of every Society to improve upon it, as well as upon Manufactures or Husbandry. No particular Form therefore can be neceſſary, as no particular Form is preferable to another, unleſs ſo far as it has a greater Tendency to promote its End, the Good of the Society. Comparing Democracy, Ariſtocracy and Monarchy together, this is their common Standard.

THERE

THERE is a People inhabiting the Earth, who are not left to the Choice of their Governors, but are by Nature ſubjected to Monarchy. In every Society there is a Royal Family, of a different Species from the other Members. Every Monarch is born with Marks of Royalty, of a peculiar Shape, and with ſuperior Beauty. We may ſuppoſe, that the Excellencies of the Mind are not inferior to thoſe of the Body; and no Wonder when this is the Caſe, that perfect Obedience is given through all the State, and that their Monarch's Will is their only Law. There the Parts are juſtly diſtributed, the Sovereign framed for Command, as the Subjects for Obedience, each in their ſeveral Capacities equally contributing to the only End of Government, the Well-being of the Society. Here there can be no ſtretching of Prerogative on the one Hand, no Reſiſtance nor even Murmurs on the other. The Monarch taught by Nature, that the Sovereign Power is a Truſt which ought not to be abuſed, has no Deſire but to promote the publick Welfare. The

People

People taught by Nature, that paſſive Obedience and Non-reſiſtance are the only Means to promote their Happineſs, implicitely ſubmit themſelves to their Monarch's Will.

Were Mankind ſo framed, for of Inſects we have been ſpeaking, theſe Gentlemen would have Reaſon on their Side, who declare ſo ſtrongly for indefeaſible-hereditary Right, and the reciprocal Duty of paſſive Obedience and Non-reſiſtance: Were our Royal Family, like that of the Bees, diſtinguiſhed from the Maſs of the People by ſuperior Excellencies, whether of the Mind or Body, were they unerringly prompted by Nature to exerciſe their Power for the Welfare of the Society, blind Obedience to their Will would be a Virtue. But when we truſt with ſovereign Power one of the common Stamp of Mankind, who has by Nature no Marks of Royalty, and who perhaps by Nature is not fitted for Command, the Abſurdity is great, to maintain, That this Perſon ought to be under no Controul, and that we ought to

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continue to truſt him, after repeated Inſtances of his betraying the Truſt repoſed in him.

I HAVE no Occaſion to conſider whether Conqueſt be a good Title by the Law of Nature, to acquire the abſolute Dominion of a State, as in *Turky*, where the Grand Signior is ſuppoſed to be the Lord of the Manor, and all the People his Slaves. This is not Government, the Characteriſtic of which is, Truſt repoſed in one for the Good of the whole. It is like a private Eſtate, which may be diſpoſed of by the Proprietor without Controul, and applied for his own Purpoſes. It cannot be pretended that the King of *Britain* has his Right by Conqueſt; and therefore no Support can be drawn to the Argument from that Quarter.

THE Scheme, it muſt be yeilded, is ſo far conſiſtent, that if we ſuppoſe the King's Right to be indefeaſible, and that he cannot be deprived of his Authority, however much his Meaſures ſwerve from the Rules of good Government

vernment, it muſt follow, that the People are tied to paſſive Obedience and Non-reſiſtance, as there is no *Medium* betwixt Reſiſtance and Obedience. But where is the Foundation of the indefeaſible Right of the King, more than of any other Officer of the State? Does it lie in the Name? One ſhould ſcarce think ſo, when the Name is indifferently applied to Governors who have very little Power, as well as to thoſe whoſe Power is the moſt extenſive. It cannot ly in the Nature of the Office, which being a Truſt, is undoubtedly forfeitable upon Mal-adminiſtration. It will perhaps be ſaid to ly in the Conſtitution of our Government. So far from it, that no Man is bound to obey the King's Commands, unleſs delivered in a certain Form preſcribed by Law. And even in *France*, ſuppoſing it an abſolute Monarchy, without any conſtitutional Check upon the King's Actions, the King's Power is notwithſtanding limited. There cannot be ſuch a Thing in Nature, as for a People voluntarily to ſurrender their Liberties to the arbitrary

Will

Will of any Man. The Act would be void as inconſiſtent with the great Law of Nature, *ſalus populi ſuprema lex.*

But the Favourers of this Doctrine, when beat out of theſe Entrenchments, have a Retreat, which they ſuppoſe impregnable. They allow at laſt that the King may do wrong, by betraying the Truſt repoſed in him. But then they maintain, that a King having no Superior on Earth, can have no proper Judge of his Actions but God alone, from whom his Power flows; and therefore is accountable to the Almighty only. This is a Fortreſs built upon Sand. All Power no doubt is from God, natural and legal; for he is the Creator and Upholder of all Things. But it follows from this, inſtead of being contradictory to it, that every Sort of Power is limited by the Oppoſition of other Powers, natural or legal, which are equally from God with the Power reſiſted. Perhaps they mean that every King has his Commiſſion from the Almighty, and not from the People. Hi-

ſtory alone may ſuffice to inform us, that this cannot be, when there have exiſted ſo many Kings unworthy of Command. But ſuppoſing the Fact, it does not follow, that this Commiſſion is unlimited. On the contrary, it muſt be limited; for who can patronize ſo impious a Doctrine as that God ſhould give a direct Commiſſion to any Being to plague and perſecute Mankind, unleſs for their Sins? The Voice of Nature is the Voice of God; and it is a fixed Principle in the Law of Nature, that where there is no common Judge to appeal to, the Party injured may do himſelf Juſtice. The Laws are ſuperior to the King, and theſe he muſt be judged by. And ſuppoſing an abſolute Government in the ſtricteſt Senſe, where the King's Will is Law, yet there is always one Law above him. If his Actions generally tend to Deſtruction, inſtead of Government, the People, who have no Judge to appeal to, may lawfully do themſelves Right. *Salus populi eſt ſuprema lex.*

But after all, where is the Neceſſity of God's extraordinary Interpoſition, by granting his immediate Commiſſion to Kings, when in other Matters he chuſes to govern the World by ſecond Cauſes and ordinary Means. Why ſhould we ſuppoſe, that Mankind are deprived of their natural Privilege of chuſing their firſt Magiſtrate, more than of chuſing thoſe that are ſubordinate? Where is this Commiſſion recorded? Is it given to all Rulers who have the Name of *King*, or are ſome Nations peculiarly honoured? Is it given to all Sovereigns in general, whether honoured with the Name of *King* or not? Had all the Crown-Vaſſals in *France*, Dukes, Earls, Barons, this Commiſſion, who uſurped, and, for many Ages, poſſeſſed a Sort of Sovereignty within their own Territories? Theſe are puzzling Queſtions, and it would require a moſt expreſs Revelation to put an End to the Doubts that ariſe from them. The legiſlative Power one ſhould imagine is of a ſuperior Rank to that of the King, becauſe it gives Laws to the King; yet no peculiar

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Interpoſition of Providence is pretended in its Behalf. This Body is left to be modelled by Choice or by Accident. The Government of the World is after this Manner carried on; and yet nothing happens, we may preſume, contradictory to the original Plan of Providence: Why then a peculiar Providence in Behalf of Kings, or an immediate Revelation, when there appears to be no Neceſſity? We cannot, without Impiety, admit of the Suppoſition, when, ſo far as weak Man can conjecture about the Operations of the Almighty, he never interpoſes by extraordinary Means, unleſs where the ordinary Diſpenſations of Providence prove inſufficient to anſwer his Purpoſes: We may therefore conclude, with the higheſt Degree of Aſſurance, that Kings have no other Commiſſion from God, but what every Magiſtrate has, ſupreme and ſubordinate, who is legally elected according to the ſtanding Laws of the Society to which he belongs.

But Doubts and Difficulties multiply upon us. Were all the Nations pointed out by an expreſs Revelation, who, like the *Jews* of old, are to be governed by Magiſtrates of God's expreſs Appointment. Were all the Families pointed out who are to bear his Commiſſion, the Revelation would ſtill be imperfect. It is not enough to point out the Family; the Rules of Succeſſion muſt alſo be aſcertained, that there be no Diſpute about the particular Perſons who are to enjoy this Hereditary-indefeaſible Right. Here, without a new Revelation, we are left in a great Meaſure at an Uncertainty; for are we to follow the Rules of *England* or *France*? Are we to be guided by the Law as at preſent eſtabliſhed, or as it was three Centuries ago? Whatever Rules are followed, we muſt ſee that they are in a great Meaſure arbitrary, the Offspring of Accident, or of the ſlendereſt Feelings of the Imagination, and eſtabliſhed by Cuſtom only. Has not this a ſtrong Appearance of leaving to every Nation the Choice of their own chief Magiſtrates? Kings were at firſt

generally choſen for Life. It crept into Practice to make all publick Offices hereditary; and ſo the ſovereign Power has generally come to be hereditary, partly from the Bent of the People, and partly to avoid the Inconveniencies which elective Monarchy is ſubjected to. But after what Manner is this hereditary Right of Kings carried on? Not by any univerſal Law, expreſly revealed or wrought into the Nature of Man; ſo far from it, that the Rules of Succeſſion are different in every different Country, eſtabliſhed by Cuſtom alone, or, in other Words, by the Conſent of the People. In *France*, for Example, the Females are totally excluded. Have Females by the Appointment of the Almighty this indefeaſible Right of Succeſſion? If they have, *France* for many Ages have been in a damnable Error. If not, the Load of the Guilt muſt ly upon *England*, and upon many other Countries who admit of Female Succeſſion. In my Apprehenſion, this Conſequence cannot be evaded, otherways than by fairly acknowledging, that God in this Matter, as

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well as in others, works by ſecond Cauſes without any direct Interpoſition, leaving every Nation to be governed by Laws of their own Appointment. And indeed nothing looks liker a Contradiction, than to ſuppoſe, that hereditary Monarchy is the Appointment of the Almighty, and that he has beſtowed upon every Heir an indefeaſible Right, not to be diſpenſed with upon any Occaſion whatever, without pointing out, by infallible Marks, the Perſons who are to enjoy this extraordinary Privilege; commanding us, under the Pain of Damnation, to give entire Submiſſion to Perſons, as Rulers appointed by him, without revealing who theſe Perſons are.

ANOTHER Inference may be drawn from this Doubtfulneſs of the Law of Succeſſion. It is a ſelf-evident Propoſition, that no Right can be ſtronger, than the Title upon which it is founded. No Title is more ſlender, in moſt Inſtances, than that of Succeſſion. How then can it be maintained, that the hereditary Right of Kings is indefeaſible, when the Title upon

upon which the Right is founded is ſo weak and ſo arbitrary. I think we may with Certainty conclude, that ſuch a Right muſt, upon every Occaſion, give Place to the primary Rights of Nature, ſuch as tend to our Preſervation and Well-being: And therefore that any particular Heir may be ſafely ſet aſide, when he becomes dangerous to the Society. For this is aſſuredly the Voice of God, That in every Conflict the weaker Right muſt yield to the ſtronger. Nay, we may go one Step further, that if the Good of the Society can be more promoted by a different Form of Government, hereditary Right may be laid aſide altogether without any Crime; ſince the Good of the Society is an Object of much greater Importance than the Right of any particular Family can be.

TOUCHING the Family of *Stewart*, no Right has a leſs Air of Divine Authority, than what they had to the Crown of *Britain*. To look no further back than to the Competition betwixt *Bruce* and *Baliol*, which, in theſe Days,

Days, appeared, and truly was an intricate Affair: Was *Baliol* a King by Divine Appointment, when he was acknowledged and ſubmitted to, in conſequence of an Award given by *Edward* of *England*, who plainly manifeſted, by the whole Courſe of his Proceedings, that he was more ſwayed by political Conſiderations, than by Juſtice and Equity? Unhappy is the Condition of that People, who, under the Pain of Damnation, muſt yield paſſive Obedience and Non-reſiſtance to a Monarch, and yet have no better Authority to direct their Duty, than ſuch an Award. It will be ſaid, that the Merits of the Cauſe were with *Baliol*. But how the Patrons of the Divine Right of Kings ſhould come to a Certainty in this Matter, I'm at a Loſs to underſtand. For not to mention the Pretenſions of his Competitor *Bruce*, it is perhaps not extremely clear, that a Female has any Divine Right to a Crown; at leaſt, there is no Inſtance of this amongſt the *Jews*. And if Females are admitted, I cannot ſee why the Kingdom ought not to be ſplit amongſt Fe-

male Heirs, as well as a private Eſtate. If Right to a Crown be conſidered as a Matter of Property, there certainly ought to be no Difference. But laying aſide all Difficulties, and ſuppoſing *Baliol*'s Right of Primogeniture to be invincibly good, 'tis plain *Robert Bruce* could have no Divine Right, nor can the *Stewart*'s have a Divine Right who derive their Right from him. It is but a mean Subterfuge, That none of *Baliol*'s Race appear to claim the Crown. Will it be ſaid, that this Nation continued in an obſtinate Courſe of Rebellion againſt the King of Heaven, ſo long as any of *Baliol*'s Race exiſted? How do we know they do not at preſent exiſt? It is our indiſpenſible Duty to ſearch for the King whom God has given us, thro' every Corner of the Earth. And 'tis equally our Duty to refuſe our Obedience to an Uſurper; and he muſt be ſo, who has not a hereditary Right, and conſequently, is not of God's Appointment. Let us keep in View that Preſcription, poſitive or negative, can avail nothing, which

which has no other Foundation but univerſal Conſent, implied from a long Acquieſcence.

THE Aſſerters of this Divine Right dare not yield, that *Baliol* forfeited the Crown of *Scotland*, by acknowledging himſelf to be the King of *England*'s Vaſſal; for this would be juſtifying the late Revolution in every Point. Making an independent Kingdom a Fief of another Sovereignty, is not more ſubverſive of the Conſtitution, than the Meaſures are, which were purſued by *James* VII. during the whole Courſe of his Reign. And if the People of *Scotland* could lawfully judge, that *Baliol* had ſubverted the Conſtitution, and upon that Judgment transfer the Crown to another; the People of *Britain* had the ſame Title to give Judgment againſt *James* VII. and to declare that he had forfeited the Crown.

WITH regard to *England*, the Pretext of a Divine Right is ſtill more lame, if poſſible. *William* the Conquerot was a Baſtard, and could have no Divine Right to the Dukedom of

of *Normandy*; nor did he himſelf pretend any other Right to the Crown of *England*, than by the Teſtament of *Edward* the Confeſſor. But ſuppoſing him to have conquered *England*, which will not be readily yielded, he certainly did not conquer his *Norman* Subjects who came over with him to *England*, and from whom, for ought we know, a great Part of the Nation are deſcended. The *Stewarts* therefore who have no other Claim to the Crown of *England*, but by a Female Connection with the Race of *William* the Conqueror, cannot, with any Shadow of Reaſon, inſiſt upon their beloved Doctrine of a Divine Right, ſo far as concerns the *Engliſh*, who are of *Norman* Extraction.

Upon the whole, ſuppoſing the hereditary Right of Kings to be the Appointment of God, indefeaſible and indiſpenſable, the following Points ought to be aſcertained; 1*mo*, Whether this Law be univerſal, to take Place over the whole Earth, or if it be limited to certain Nations, and what theſe Nations are.

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2*do*, To what particular Families does this Divine Right belong, who are thus made ſuperior to the reſt of Mankind. 3*tio*, The Rules of Succeſſion, which concern theſe particular Families, ought to be diſtinct and perſpicuous, ſo as to procure a perfect Agreement amongſt Mankind, as about the primary Laws of Nature. 4*to*, Theſe Rules ought to be wrought into our Nature, and the Tranſgreſſion of them attended with the ſtrongeſt Senſe of Immorality, like Treachery or Murder. Were theſe Points thoroughly cleared, the Scheme might be conſiſtent. But as it ſtands, it is attended with Doubts and Darkneſs, to lead every honeſt Heart who eſpouſes it, into endleſs Perplexities.

MODERN Hiſtories are full of the Evils occaſioned by diſputed Succeſſions; they are ſtill fuller of the Evils occaſioned by Conteſts about the King's Prerogative. There can be no Moderation in ſuch Controverſies, where God Almighty is made a Party, and every Perſon called *impious* who takes the oppoſite

poſite Side. Hereby it comes, that this Doctrine of the hereditary indefeaſible Right of Kings ſeldom fails to break the Peace of Society, to foſter inveterate Enmities, and to be the Source of endleſs Wars; of which, were there no other Evidence, the preſent Times afford a deplorable Inſtance. So that, if we are to give any Parent to this Doctrine, other than blind Enthuſiaſm, we can never aſcribe it to a good Being. And indeed if there is an inviſible Power, a greater Enemy to Mankind than another, he could not poſſibly inſtill into us a more poiſonous Principle. Plague and Famine are nothing to it.

But, tho' I have been deſervedly ſevere upon the Doctrine, I would not be underſtood to paſs the ſame Cenſure upon its Votaries. I am ſenſible the further removed a Tenet is from Truth, the Difficulty of Converſion, is proportionally great. 'Tis like Love beſtowed upon an ugly Woman, which is obſerved to be ever without Bounds. The *Jacobites*, ſuch as are not of a deſperate Fortune, certainly deſerve Com-

Compaſſion, even while they are laying waſte their Country by inteſtine Commotions. They can have no other Motive but Principle, when they venture their Lives and Fortunes in the Service of their Idol Prince, as their Proſpect of Succeſs can never balance the Hazard. What Pity is it they were not employed in a better Cauſe. But if nothing elſe will open their Eyes, ought it not to have ſome Weight, that there is nothing more repugnant to the Laws which muſt govern all Societies, than for any ſingle Man, or Set of Men, to force their Opinion upon the Majority. How would they reliſh the Behaviour of a Member of their own Parliament, who ſhould endeavour by Force of Arms to oblige the whole Body to ſubmit to his Sentiment? Or how would they reliſh it, that a Body of Men ſhould riſe in Arms upon no better Pretext, than the procuring Juſtice to a Friend whom they ſuppoſe to be unjuſtly condemned by the whole Body of Judges? Is it not an Excuſe commonly given by *Banditti*, for robbing on the Highway, that they

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are but making Repriſals upon Account of Goods unjuſtly wreſted from them by Authority of Law: Yet this is preciſely the preſent Caſe. The late King *James* was ſet aſide by the ſovereign Authority of the Nation, that is, by the Act of the Majority, who, from the very Nature of Society, muſt be the ultimate Judges, in all Matters which concern their Preſervation and Well-being. Perhaps he was unjuſtly condemned. Be it ſo for Argument's Sake. But an ultimate Judgement muſt ly ſomewhere, without further Appeal. It muſt be a fundamental Law in all Societies to acquieſce in this ultimate Judgment, right or wrong, without which Concord cannot be preſerved, but for a Moment. No honeſt Remedy after this can remain, but to deſert the Society and to join ſome other, where the Rules of Juſtice are ſuppoſed to be better obſerved. Can it be thought that the Right of any Man in a Society, ſuppoſing him to be a chief Magiſtrate, truſted with the greateſt Powers, is ſuperior to the fundamental Laws of the Society, whence he

he derives this Right? It is an Abſurdity, the ſame, as, that a Part is greater than the whole. It were to be wiſhed, that Gentlemen would ſeriouſly conſider this Matter, who are ſo ſtrenuous for the Claim of an abdicated King, and who would embroil Heaven and Earth to compaſs the Reſtoration of the Family. And would they but allow themſelves to think, with any Degree of Coolneſs, they would ſoon be convinced, That the Peace of Society is an Object of greater Importance than the Right of any particular Man can be, ſuppoſing him to be deſcended from a thouſand Kings.

NOTE of ſome Things omitted in the Eſſay upon Honour and Dignity.

THERE appears upon the Records a Form of creating Peers, different from any mentioned. One remarkable Inſtance, is an Act of the 7th Parliament, *James* VI. *anno* 1581, bearing, That the Lands of *Doun*, &c. were feued by Queen *Mary* to Sir *James Stewart* of *Doun* Knight, his Heirs, *&c.* ſubſuming, that the ſaid Sir *James* being deſcended of the Royal Blood, "therefore his Highneſs, with Advice of his three Eſtates, erects, creates, unites, annexes and incorporates all and ſundry the foreſaid Lands, Offices, and other Particulars above written, in an *Lordſhip*, to be called in all Time coming the Lordſhip of *Doun*, decerning and ordaining the ſaid Sir *James*, his Heirs and Succeſſors, ſpecified in the Infeftment, in all Time coming, to be called and intituled *Lords of* Doun, who ſhall have the Honour, Dignity, Place and Preheminence of a Lord of our ſovereign Lord's Parliament,

"in

" in all Parliaments, Aſſemblies, and other " Conventions, with his Arms effeiring there- " to; and giving unto him all Honours, Dig- " nities and Preheminencies which pertained, " or of Right and Conſuetude ought to per- " tain, to a Lord of Parliament."

THIS Form, 'tis preſumed, has been introduced, in Imitation of the old Form of creating an Earl, by erecting his Lands into a County. And hence the Deſign and Uſe of erecting Lands into a *Dominium* or Lordſhip. Patents in the above Form are doubtleſs of the King's Grant, as well as other Patents. This, in favours of Lord *Doun*, has been done in Parliament for the greater Solemnity, the King being at that Time under Age.

FINIS.